

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

HODELL-NATCO INDUSTRIES, INC.,

08CV2755

Plaintiff,

vs.

June 17, 2015

8:30 a.m.

SAP AMERICA, INC., ET AL.,

Volume 3

Defendants.

Pages 491-766

TRANSCRIPT OF JURY TRIAL PROCEEDINGS  
BEFORE THE HONORABLE DONALD C. NUGENT  
UNITED STATES DISTRICT JUDGE  
AND A JURY

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24 Proceedings recorded by mechanical stenography;  
25 transcript produced by computer-aided transcription.

1 | WEDNESDAY, JUNE 17, 2015, 9:16 A.M.

2 (Proceedings in presence of jury:)

3 THE COURT: We are missing Sean. He had to  
4 have surgery today. I hope we don't lose anybody else.

09:16:10	5	Mr. Lowery, you may continue.
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6 MS. LUARDE: Your Honor, we noticed there  
7 are two witnesses in the back of the room.

8 Under Rule 615, we would like them --

9 THE COURT: Are you making a motion for  
09:16:10 10 separation of witnesses?

11 MS. LUARDE: Yes, please.

12 MR. MILLER: Your Honor, I'm not sure --

13	THE COURT: Who are you?
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14	A SPEAKER: We are observers, Your Honor.
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09:16:10 15	THE COURT: You are not witnesses?
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16 MR. MILLER: Thank you, Your Honor.

17 I didn't recognize them.

18 THE COURT: Do you want to be witnesses?

19 A SPEAKER: No, thank you.

09:16:10 20 THE COURT: Do you want to make a speech or  
21 anything? No.

22 Remember, I told you how the lawyers talk  
23 to the witnesses before they call them?

24	Sorry, Sharon.
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09:16:10 25 MR. MILLER: They didn't look familiar to

1 me, Your Honor.

2 Thank you.

3 THE COURT: I have to tell you a story.

4 When I was a Prosecutor, I tried all kinds  
09:16:10 5 of murder, death cases, and all these tough cases and  
6 stuff, never ever thought, had a concern about the jury,  
7 what they thought about people coming in the courtroom.

8 My first case as a Judge in Common Pleas  
9 Court, I go back to the jury, the first they ask is "who  
09:16:10 10 are all these people coming in and out of the courtroom?"  
11 I said they had nothing to do with the cases. You always  
12 have other cases going on and stuff like that.

13 It was interesting to me. I probably  
14 should have mentioned it at the beginning because, you  
09:16:10 15 know, you observe everything that happens here, and not  
16 in a case like this, necessarily, but if you had a --  
17 probably a hard-fought murder case or something like  
18 that, you may be like, "oh, are the people in the back  
19 following me around? Do they know anything about me?"

09:16:10 20 The answer is no, they don't. The people  
21 coming in and out of the courtroom usually are on another  
22 case. It is rare they are on the case that is presently  
23 being heard, especially in state court. Just so you  
24 know. All right?

09:16:10 25 Okay. You may proceed.

1                   DIRECT EXAMINATION OF DANIEL LOWERY (RESUMED)

2           BY MR. LAMBERT:

3           Q.     Mr. Lowery, I have a few questions to ask you and I  
4           think we'll be done.

09:16:10 5                   You testified that Hodell had problems with  
6           the implementation after it went live.

7                   Do you recall that testimony?

8           A.     Yes.

9           Q.     Did you contact anybody at SAP with regard to these  
09:16:11 10          problems?

11          A.     Yes. From go-live on, my job primarily was getting  
12          more and more people from SAP involved to help solve the  
13          problem.

14          Q.     And who in particular did you get involved?

09:16:11 15          A.     We started with Dan Kraus and Ken Lorenzo, moved up  
16          to Sotnick. I was sending e-mails to Bill McDermott, the  
17          president of North America. I drafted an e-mail written  
18          in German by my office manager to the CEO of SAP AG, I  
19          believe the name is Hagemann, and Udi Ziv, et cetera.  
09:16:11 20          That did successfully start to get people involved.

21          Q.     You mentioned Udi Ziv.

22                   Can you tell the jury who Udi Ziv is.

23          A.     He was the product manager of the SAP business  
24          product over in Israel.

09:16:11 25          Q.     Can you turn to Exhibit 78 in your binder.

1 A. I'm going to try to listen better for the jury  
2 today.

3 78?

4 Q. Yes, sir.

09:16:11 5 A. Okay.

6 Q. Can you turn to the last page of the document,  
7 Mr. Lowery.

8 A. I'm there.

9 Q. There is an e-mail reflected on Exhibit 78.4.

09:16:11 10 Do you see that?

11 A. Yes.

12 Q. Can you identify that for the jury.

13 A. That was an e-mail from me to Udi Ziv, copy to Dan  
14 Kraus, Sontick, Seligmann. I forget what Rodney  
09:16:11 15 Seligmann's title was. But it was to Udi Ziv, the  
16 product manager in Israel.

17 Q. And what's the date of that e-mail?

18 A. That was April 2007. Shortly after go-live.

19 Q. Can you read your e-mail to Mr. Ziv for the jury.

09:16:11 20 A. "Udi, I have a customer that needs you to call him

21 with me. He is red hot at the performance of SAP

22 Business One and wants to know two things: Why is it

23 taking so long for SAP to fix the problem? And two, when

24 will he receive his fix? It takes two hours to key in a

09:16:11 25 large order and scales down from there. He is bleeding

1 money and is threatening to throw out the system,  
2 Hodell-Natco, Incorporated, in Cleveland."

3 Q. And was that accurate at the time you wrote it?

4 A. Yes.

09:16:11 5 Q. Did Mr. Ziv respond to you?

6 A. He did.

7 Q. Can you identify his response to you on Exhibit 78?

8 A. Let me find it.

9 78.2 is an e-mail from Udi Ziv to me,  
09:16:11 10 carbon copy many people at SAP.

11 "Dan, as you know, this customer's  
12 environment is far outside the Sweet Spot of Business  
13 One, with 120 users, and therefore, we anticipate that  
14 such performance issues will come up."

09:16:12 15 "Having said that, we believe we have  
16 identified the issue that may be causing this specific  
17 performance problem, but there is no real way to verify  
18 this until we use it for real in the customer's  
19 environment. The fix will be included in the April  
09:16:12 20 patch, scheduled for the end of the month. I know it is  
21 late for the customer, but presenting a hotfix for such  
22 an issue is too risky and may make the situation even  
23 worse, as we cannot perform the same amount of testing on  
24 a hotfix."

09:16:12 25 "Best regards, Udi."

1 Q. The first sentence of that e-mail says "as you  
2 know, the customer's environment is far outside the Sweet  
3 Spot."

4 You just read that, correct?

09:16:12 5 A. Yes.

6 Q. Prior to receiving this e-mail, did you -- had you  
7 heard of a Sweet Spot for SAP Business One?

8 A. No.

9 Q. Is this the first time you had heard of such a  
09:16:12 10 term?

11 A. Yes.

12 Q. Did you respond to Mr. Ziv's e-mail?

13 A. Did I respond to this e-mail?

14 Q. Yes.

09:16:12 15 A. Yes.

16 Q. Can you direct the jury to where on Exhibit 78.

17 A. It is Exhibit 78. It is from me to Udi Ziv, dated  
18 Sunday, April 15.

19 Q. Is it on the first page of that exhibit?

09:16:12 20 A. It is.

21 Q. Down at the bottom?

22 A. It is, yes.

23 Q. What's the date of that e-mail?

24 A. April 15th, 2007.

09:16:12 25 Q. And who is included on that e-mail?



1 A. Jon Woodrum, Dan Kraus, Michael Sotnick, Rodney  
2 Seligmann, and Niels Stenfeldt.

3 Q. Can you identify for the jury who was an SAP  
4 employee on that e-mail.

09:16:12 5 A. Jon Woodrum was mine. Dan Kraus, SAP. Michael  
6 Sotnick, of course, was the senior VP. Rodney Seligmann,  
7 I don't know his title, but he was SAP. And Niels  
8 Stenfeldt had to be SAP, he didn't work for me.

9 Q. Can you read your response to Mr. Ziv for the jury.

09:16:12 10 A. "Udi, thank you for the quick response, but hope I  
11 don't sound stupid, but I don't understand, 'as you know,  
12 this customer's environment is far outside the Sweet Spot  
13 of Business One, with 120 users, and therefore, we  
14 anticipate that such performance issues will come up.' I  
08:40:45 15 don't understand that at all and never heard that  
16 before."

17 "The whole reason they bought SAP was  
18 because it was supposed to scale to their growth.  
19 They're planning more acquisitions, adding more users,  
08:40:57 20 and this was their known objective since day one,  
21 two-plus years ago by everyone, SAP included."

22 "Why did SAP let us go this long before  
23 telling us this was not the product for Hodell? I just  
24 spent \$1 million developing the product to SAP  
08:41:14 25 specifications. What am I supposed to do now? More

1       importantly, what am I supposed to tell Hodell? This is  
2       unbelievable."

3       Q.       And were the statements made in that e-mail  
4       accurate when you made them?

09:16:13 5       A.       Yes.

6       Q.       Did anyone from SAP respond to your April 15, 2007  
7       e-mail?

8                       Can I direct your attention to the top of  
9       page 78.

09:16:13 10      A.       The very first one?

11      Q.       Yes.

12      A.       It is to Dan Lowery from Dan Kraus.

13      Q.       Is that Dan Kraus' response to your e-mail that you  
14      just read?

09:16:13 15      A.       Let's see. Second S.O.S. from partner for help.

16                       Right. He responded to my e-mail.

17      Q.       And can you read Mr. Kraus' response for the jury.

18      A.       "Dan, your development team and others have been

19      told that this is outside the Sweet Spot a number of

08:42:20 20      times. When Hodell purchased, there was no such

21      definition, but in the two years since, we have shared

22      this information both directly with your team around

23      Hodell-Natco and in general at FKOM summer sales meetings

24      and through the use of the online qualification tool.

08:42:38 25      This is also why Geoff Ashley, Ralf's team, the solution

1 architects, and I have all been so forthright about full  
2 testing before go-live."

3 Q. Do you agree with Mr. Kraus' statements in that  
4 e-mail?

09:16:13 5 A. No.

6 Q. What in particular do you disagree with?

7 A. That we were told that we were way outside the  
8 Sweet Spot of SAP Business One.

9 Q. Can you turn to Exhibit 247 in your binder.

09:16:13 10 A. 247?

11 Q. Yes, sir.

12 Can you turn to the last e-mail in that  
13 chain. It begins on the first page and spills over into  
14 the second.

09:16:13 15 A. Okay. The big one?

16 Q. Yes.

17 A. Okay.

18 Q. Can you identify that e-mail for the jury.

19 A. It's from me to Kevin Reidl and Otto Reidl. The  
09:16:13 20 subject is titled "personal update."

21 Q. Do you see the e-mail starting in the middle of the  
22 first page of Exhibit 247?

23 A. Oh, from Dan Lowery to Dirk Boessmann and Udi Ziv  
24 dated April 2007.

09:16:13 25 Q. I'm sorry. The one from Otto Reidl to yourself,

1 April 25, 2007, do you see that?

2 Maybe you can pull it up.

3 A. It is from Otto to me?

4 Q. Yes, sir.

09:16:13 5 A. I see it.

6 Q. And what is Mr. Reidl telling you in that e-mail?

7 A. Can you give me a second?

8 MR. MILLER: Your Honor, objection.

9 Hearsay.

09:16:13 10 THE COURT: Let the witness do the

11 summarizing.

12 MR. MILLER: Thank you.

13 THE WITNESS: What do I do?

14 BY MR. LAMBERT:

09:16:13 15 Q. Did you forward this e-mail on to anyone at SAP?

16 A. Possibly. I don't know.

17 Q. Can you look at the first page of Exhibit 247.

18 A. Okay.

19 Q. There is an e-mail from Dan Lowery to Dirk

09:16:13 20 Boessmann and some other folks.

21 Do you see that?

22 A. Udi Ziv. Yes. It is a personal update from Otto.

23 Q. Okay.

24 A. It was, "Dirk and Udi, just so you know what I'm

08:45:32 25 hearing from the customer, Dan."

1 Q. So you are passing along Mr. Reidl's comments to  
2 SAP?

3 A. I did.

09:16:14

4 Q. You were not copied on the last e-mail of that  
5 chain at the top of 247, are you?

6 A. No. This was an internal --

7 Q. Can you identify the senders and recipients of the  
8 e-mail?

09:16:14

9 A. It was from Udi Ziv, the product manager, to Dan  
10 Kraus and Niels Stenfeldt, and carbon copy Dirk  
11 Boessmann.

12 Q. Are those all SAP employees, to your knowledge?

13 A. Yes. Those are all SAP employees.

09:16:14

14 Q. Were you made aware of that information  
15 -- information reflected in that e-mail?

16 A. Can I read it?

17 Q. Sure.

08:46:26

18 A. "Guys, there is not much that we can do here. We  
19 will supply what may be a fix for the current problem,  
20 but we know that there will be others. There is no doubt  
21 that this is not a B1 customer and we somehow need to get  
22 away from this. Udi."

23 I was not copied on that, no.

09:16:14

24 Q. Were you made aware of that information on or about  
25 April 25, 2007?

1 A. No.

2 Q. Did LSi try to figure out what was causing the  
3 problems that Hodell was experiencing with the Business  
4 One implementation?

09:16:14 5 A. We did.

6 Q. What did LSi do?

7 A. Well, I think I mentioned to the jury yesterday, I  
8 was proud of my team. And again, my job as the owner,  
9 every morning I touch base with the managers and ask  
08:47:14 10 them, "how is Hodell going?" And to that, they -- they  
11 dug in and got their hands around almost everything in  
12 the -- that was causing the slowness, and uncovered other  
13 problems. Like Kevin Reidl --

14 MR. MILLER: Objection, Your Honor.

09:16:14 15 Hearsay.

16 THE COURT: Overruled.

17 Go ahead.

18 THE WITNESS: Kevin Reidl mentioned -- I'll  
19 try to do this quickly.

08:47:38 20 Kevin Reidl mentioned yesterday that the  
21 original goal had slipped. That was due to these memory  
22 freezes, which we all had on our PCs. It was a huge  
23 problem. And we identified that and sent the information  
24 to SAP and then they eventually fixed that. So that  
08:47:58 25 -- we lost three months of time trying to get the product

1 out the door and go-live. But that is the quality of my  
2 team.

3 But then we found out the DI API -- I take  
4 my hat off to the jury because they have to listen to  
08:48:17 5 these technical names -- but the DI API is part of --

6 MR. MILLER: Objection, Your Honor.

7 There is no foundation he has the expertise  
8 to testify --

9 THE COURT: You can cross-examine him on  
08:48:26 10 it.

11 THE WITNESS: The DI API is part of the  
12 software development toolkit of SAP and it basically is  
13 the garden hose between our code and SAP Business One.

14 And it was explained to me, because I'm not  
08:48:42 15 the brightest guy in the world, it is like somebody had  
16 their heel on the garden hose, it just couldn't get the  
17 data --

18 MR. MILLER: Your Honor, it was explained  
19 to him.

08:48:52 20 THE COURT: Put another question.

21 THE WITNESS: It is my people. It is my  
22 technical team.

23 THE COURT: All right. But you're not the  
24 expert.

08:48:57 25 MR. MILLER: Move to strike.

1 THE WITNESS: No. You would have to get  
2 those guys if you want the detail.

3 There is no doubt in my mind that the --

4 MR. MILLER: Your Honor, move to strike.

09:16:15 5 BY MR. LAMBERT:

6 Q. Mr. Lowery, specifically with regard to what LSi  
7 attempted to do to address Hodell's problems, what  
8 specific aspects of the implementation did LSi look at?

9 A. What specific aspects of the implementation to help  
08:49:26 10 resolve the problem? Well, it started off, we initially  
11 -- because people were getting involved in SAP, they  
12 asked us to send pieces of our code, the area of the code  
13 that were suspects of the problem.

14 Q. What code?

08:49:40 15 A. In-Flight Enterprise.

16 Q. Okay.

17 A. To the labs in Germany I believe. And they were  
18 taking a look at the problem. I know that there is an  
19 exhibit of this somewhere.

08:50:02 20 That was the first time I knew that this  
21 was a bigger problem than it was going to be, because  
22 that lab wrote back they would have to rewrite the  
23 product, which is something they could not do quickly.

24 Q. Rewrite In-Flight?

08:50:14 25 A. Right. No. Rewrite SAP Business One, the DI API



1 product.

2 Q. Did anybody identify to you a problem with the  
3 In-Flight code?

4 A. No.

08:50:26 5 Q. Did LSi send the In-Flight code to anyone else  
6 besides SAP?

7 A. Yes.

8 Q. And who was that?

9 A. Dan Kraus asked us to send the code to another  
08:50:39 10 partner called Apollo. With much angst, we sent some of  
11 the code, because our code is our asset. That is our  
12 most precious product.

13 Q. Can you identify who Apollo is?

14 A. It is an SAP Business One business partner.

08:51:00 15 Q. Okay. So you were asked to send the In-Flight code  
16 to another SAP business partner?

17 A. Right. So that they could take a look at our code.

18 Q. Did you in fact do that?

19 A. We did do that.

08:51:12 20 Q. And did Apollo respond to you?

21 MR. MILLER: Your Honor, more hearsay.

22 THE COURT: Overruled.

23 THE WITNESS: Did Apollo respond? Yes.

24 They responded through our people that they found nothing  
08:51:26 25 wrong.

1 BY MR. LAMBERT:

2 Q. They found nothing wrong with the In-Flight code?

3 A. No. Gave our guys compliments on how they  
4 approached it as a matter of fact, if I remember  
08:51:34 5 correctly.

6 Q. Did LSi evaluate whether Radio Beacon was causing  
7 any of the problems that Hodell experienced?

8 A. Radio Beacon was involved in that early-on memory  
9 freezing, but again, that was resolved. It was an SAP  
08:51:49 10 issue.

11 Q. So you determined that -- LSi determined that  
12 In-Flight was not causing the problems, correct?

13 A. Correct.

14 Q. Nor was Radio Beacon, correct?

08:52:00 15 A. Nor Radio Beacon.

16 Q. So what do you believe was causing the problem?

17 MR. MILLER: Objection, Your Honor.

18 THE COURT: Objection sustained.

19 MR. MILLER: Thank you.

08:52:06 20 Move to strike.

21 MR. LAMBERT: Your Honor, we don't have  
22 anything further.

23 THE COURT: Thank you.

24 You may cross-examine.

09:16:16 25 MR. MILLER: Thank you, Your Honor.

1	CROSS-EXAMINATION OF DANIEL LOWERY
---	------------------------------------

2 BY MR. MILLER:

3 Q. Good morning, Mr. Lowery.

4      A.      Good morning.

09:16:16	5	Q. We met two days ago. My name is Michael Miller.
----------	---	--

6	A. We did.
---	------------

7 Q. Thank you for being here. I have a series of  
8 questions.

9 I'm going to start about something you  
08:53:15 10 testified about yesterday, basically, your own personal  
11 involvement with Hodell.

12 And I want to be clear, you were not  
13 involved with Hodell until literally years after Dale Van  
14 Leeuwen was involved with them?

08:53:34 15 | A. You mean since --

16	Q. Very simple question.
----	--------------------------

17 You were not involved with Hodell --

18       A.     I'm just trying to understand it.  You mean since  
19       he -- when he first sold him FACTS way back when?

08:53:45 20 | Q. That's my point.

21                   You were not involved with Hodell until  
22       literally years after Dale was working with them?

23	A. Correct.
----	-------------

24      0.      And I want to understand.

08:53:57 25	You owned the company and you started a
-------------	---

1 company called LSi?

2 A. Correct.

3 Q. Right. That was in 1989?

4 A. '89. Correct.

08:54:01 5 Q. You were the president, the majority owner of LSi?

6 A. I was.

7 Q. And IBIS was a separate company that was started by  
8 Dale Van Leeuwen, right?

9 A. Correct.

08:54:10 10 Q. And IBIS had this pre-existing relationship with  
11 Hodell that went back many years, we heard about that  
12 over the course of the last couple days, right?

13 A. Correct.

14 Q. And you knew Dale from the software industry?

08:54:24 15 A. Correct.

16 Q. And in May of 2004, your company LSi acquired  
17 Dale's company IBIS?

18 A. April 28th, 2004.

19 Q. April or May 2004, is that correct?

08:54:35 20 A. Correct.

21 Q. Okay. And you were not -- again, just to be clear,  
22 prior to that acquisition by LSi of IBIS, you were not  
23 involved with Hodell?

24 A. No.

08:54:42 25 Q. You would not even have ever heard their name

1 before that?

2 A. Oh, no, I would have. Part of the reason we bought  
3 the company was Hodell.

08:54:52

4 Q. And Dale, as you testified yesterday, he was the  
5 one, he was the salesman for the Hodell transaction,  
6 right?

7 A. Yes.

08:55:05

8 Q. He was the one who reviewed, for example, Hodell's  
9 business requirements, he is the one that knew Hodell's  
10 business requirements, right?

11 A. Correct.

12 Q. And he is the one that would have reviewed them and  
13 evaluated whether B1 was a proper fit?

14 A. B1 was -- say that again.

08:55:16

15 Q. Dale is the one that would have evaluated the  
16 requirements of Hodell and whether it would have been a  
17 fit -- B1 would have been a fit for Hodell?

18 A. Correct.

08:55:26

19 Q. And he is the one that would have, for example,  
20 evaluated Hodell's IT structure, its hardware, and  
21 whether it had the right hardware for B1 and all that?

22 A. Yes.

23 Q. Dale was involved in that?

24 A. That's right.

08:55:38

25 Q. You were not involved in that at all?

1 A. That's right.

2 Q. You would agree Dale was the architect on the  
3 project?

4 A. Yes.

08:55:43 5 Q. Okay. He also had Hodell's confidence and he had  
6 Hodell's trust?

7 A. Yes.

8 Q. Right. I think you described him in your  
9 deposition as the technical eyes and ears on the project.

08:55:55 10 Does that sound right?

11 A. Yes.

12 Q. Okay.

13 A. Up to a certain point.

14 Q. Okay. And let's talk for a minute about your  
08:56:02 15 technical expertise.

16 You're not a technical -- you're not a tech  
17 guy, right?

18 A. I am not.

19 Q. Your entire career, you talked about this  
08:56:11 20 yesterday, going back 43 years --

21 A. You had to bring that up.

22 Q. -- it's all -- is all in sales?

23 A. Sales.

24 Q. Okay. You don't have any training on the technical  
08:56:22 25 side of the software industry, is that right?

1 A. Well, unless you count three months of programming  
2 school at IBM.

3 Q. Say that again, please.

08:56:37

4 A. When you go through IBM sales training, they also  
5 teach you the fundamentals of programming.

6 Q. IBM sales training.

7 But you would agree, you don't have any  
8 training in the technical side of the software industry?

9 A. That's correct.

08:56:49

10 Q. Okay. You don't know how to write code?

11 A. I do not.

12 Q. You have zero professional certifications?

13 A. No.

08:57:00

14 Q. And except for things like sales meetings and  
15 product direction meetings, you've never had any training  
16 on any SAP product, including B1?

17 A. That's correct.

18 Q. For example --

19 THE COURT: That wasn't the president.

08:57:19

20 MR. MILLER: I was trying to think of  
21 something funny, Your Honor, and decided to curb it.

22 BY MR. MILLER:

23 Q. You know there was training given by SAP on the  
24 technical aspects of B1, right?

08:57:33

25 A. Correct.

1 Q. And people at your company, IBIS/LSi, they went to  
2 that training, right?

3 A. That's right.

4 Q. And this training was very serious, right, it was  
08:57:44 5 going on for days, it wasn't a 15 minute PowerPoint, it  
6 was three or four or five days of intense technical  
7 training on B1, correct?

8 A. Yes.

9 Q. Let's talk about DI API for a second.  
08:57:54 10 You testified just a couple minutes ago  
11 that you were pretty certain that that was what the  
12 problem was with B1, right?

13 A. Yes.

14 Q. And you're aware here that SAP's position is that  
08:58:07 15 the problem isn't the DI API type that transmits  
16 information from In-Flight Enterprise to B1, but the  
17 problem is In-Flight Enterprise itself is pushing too  
18 much information through the pipe too often, isn't that  
19 right?

09:16:18 20 MR. LAMBERT: Objection.

21 THE COURT: Overruled.

22 BY MR. MILLER:

23 Q. You're aware that that's SAP's position?

24 A. No. But I -- okay.

08:58:30 25 Q. Okay. I just want to be clear. Your view -- let's



1 make sure the jury understands.

2 The DI API, as you explain it, is the pipe  
3 that transmits information from In-Flight Enterprise,  
4 which is the customized software piece that your company  
08:58:46 5 has developed, right?

6 A. Correct.

7 Q. And the DI API is the pipe that transmits  
8 information from that In-Flight Enterprise to B1?

9 A. Correct.

08:58:54 10 Q. We all agree on that, right?

11 A. Yes.

12 Q. And your testimony earlier today is that you think  
13 that the DI API pipe which is associated with B1, you  
14 think that's the problem, right?

08:59:07 15 A. I do.

16 Q. But when you testified in your deposition and you  
17 were asked what a DI -- what the DI API was, you were not  
18 able to give a description beyond two sentences, isn't  
19 that right?

08:59:20 20 A. Can I see my deposition?

21 Q. Sure. Do you still have a copy of it from  
22 yesterday?

23 A. It was in that big book.

24 When you say I don't understand it, what --

08:59:32 25 Q. I can help.

1 MR. MILLER: May I approach, Your Honor?

2 THE WITNESS: -- is the technical part of  
3 it or what it did or what?

4 BY MR. MILLER:

08:59:38 5 Q. We'll go right to your deposition.

6 Okay. Now, had you a large binder  
7 yesterday.

8 A. I don't know where that is.

9 Q. Do you still have that?

08:59:48 10 A. No.

11 Q. Okay. Do you know where it is? Your binder is  
12 small. What I have handed you is a copy of what you had  
13 yesterday. There are fewer exhibits and attachments, so  
14 it is a little less dense.

09:00:08 15 But you recall having your deposition taken  
16 in this case, right?

17 A. I do. Sure.

18 Q. It was over four days?

19 A. Sure.

09:00:12 20 Q. Two sets of two days, I think there were 837 pages,  
21 right?

22 A. Yes.

23 Q. You testified under oath?

24 A. Yes.

09:00:20 25 Q. You were in your lawyer's office?

1 A. Yes.

2 Q. You were represented by a lawyer at the time?

3 A. I did.

4 Q. Please turn to Page 88.

09:00:29 5 A. 88?

6 Q. Page 88, Line 1.

7 A. Okay.

8 Q. I'll follow along with you.

9 Just give me a moment, please. If you go

09:00:47 10 to 87 --

11 A. 87?

12 Q. Right at the end on line 25, there is a question,  
13 right, and it says, "Okay."

14 And your answer is: "And then all the

09:00:57 15 -- this is -- as I understood it, this is what STK is, is

16 the only way they could guarantee the integrity of

17 talking to and from the SAP Business One. So you had to

18 use their toolkit, you had to use their programming

19 protocol, you had to do it like they said so that SAP

09:01:16 20 Business One could talk you through the DI API, which

21 we'll get into I'm sure?"

22 Do you see that there?

23 A. Yes.

24 Q. Data interchange and application program interface.

09:01:35 25 So that's the pipe that In-Flight talked to

1 Business One, right?

2 A. Correct.

3 Q. Okay. This guy here told you the -- this is your  
4 answer, right?

09:01:42 5 "This guy here, he told you the rules how  
6 to do that, but for sure, if you need a more technical  
7 description, get someone smarter than me."

8 A. Okay.

9 Q. Right?

09:01:50 10 So I didn't do a particularly great job of  
11 reading that, but other than what you testified to at  
12 Page 88, which is that DI API is the pipe that transmits  
13 information from In-Flight Enterprise to Business One,  
14 which we've all agreed is a very basic principle, other  
09:02:10 15 than that, if anyone needs a more technical description  
16 of what the DI API is, they've got to ask someone smarter  
17 than you?

18 A. Yes.

19 Q. Because that's all you know about DI API?

09:02:22 20 A. Yes.

21 Q. Thank you.

22 Let's talk about IBIS and LSi and Hodell's  
23 roles here.

24 You talked yesterday about SAP did not  
09:02:37 25 engage in direct B1 sales, right?

1 A. As far as -- you mean do they have a direct sales  
2 force?

3 Q. That's right.

4 A. Not to my knowledge, they did not.

09:16:19 5 Q. So just to be clear, SAP did not engage in direct  
6 sales of B1 to customers, correct?

7 A. Correct.

8 Q. The dealers did that?

9 A. Correct.

09:02:58 10 Q. Dealers like IBIS/LSi?

11 A. Correct.

12 Q. All right. And that would mean, unless there was  
13 some special circumstance, there would be no direct  
14 communication between SAP on the one hand and the  
09:03:14 15 customers on the other hand, correct, in connection with  
16 the sale of a B1 product?

17 A. I think that's too broad a statement. But in  
18 general, yes.

19 Q. Well, let's take a look at your deposition again.

09:03:24 20 Will you turn to Page 51.

21 A. 31?

22 Q. 51. I just want to be clear. I'll start at  
23 Page 50.

24 But you would agree the question posed to  
09:04:01 25 you in your deposition in your lawyer's office: "Did

1 they ever explain to you why they were doing it that  
2 way?"

3 Answer: "Well, the least expensive way to  
4 get a sales force is through channels. You don't have to  
09:04:11 5 hire a rep. You don't have to pay them a salary. You  
6 get a partner channel going and that -- that used to be  
7 the least expensive path to getting your product out. I  
8 guess similar Hodell I mean."

9 Question: "It insulates SAP from having  
09:04:26 10 direct communication with the customer."

11 There is an objection.

12 Question: "If it's only being offered  
13 through channel partners, then employees, direct  
14 employees of SAP are not communicating with the end  
09:04:37 15 user?"

16 Answer: "Well, unless we bring them in you  
17 mean, unless the partner would bring them in, yeah. I  
18 don't think I'm understanding where you went on that."

19 So unless you would bring in SAP to the  
09:04:47 20 partner, unless there was some sort of special  
21 circumstances, which is what I was asking you about  
22 before, unless there was some sort of special  
23 circumstance like that, SAP on the one hand would never  
24 be in direct contact with the customer on the other hand,  
09:05:03 25 right?

1 A. Yes.

2 Q. Okay. And in this case, just to be clear, that's  
3 exactly how it played out, there was no direct  
4 communication between SAP on the one hand and Hodell on  
09:05:15 5 the other hand until after go-live?

6 A. I'm not sure of that.

7 Q. Well, let's make it simpler for you.

8 You're not aware of any direct  
9 communication between SAP on the one hand and Hodell on  
09:05:30 10 the other hand prior to the license agreement in December  
11 of 2005?

12 Let's start there.

13 A. Well, unless we bring them in, and what that means  
14 is you can have them help you on a demo or you can have  
09:05:44 15 them help you explain paperwork, contracts, I just don't  
16 know what was -- I mean, we constantly talked to SAP.

17 Q. And that's my point though.

18 You're not aware that SAP was ever brought  
19 in to do a demo or have one of these meetings, which are  
09:05:59 20 some of these special circumstances that you're talking  
21 about in other cases?

22 When it came to Hodell, you're not aware of  
23 any direct communication or contact between SAP on the  
24 one hand and Hodell on the other?

09:06:11 25 And let's, for starters, take it up to the

1 time of this --

2 A. From my perspective, that's correct. You would  
3 have to ask Dale what he did when he was selling to them.

4 Q. I understand.

09:06:22 5 Just to be clear, you're certainly not  
6 aware of it up to the time of the license agreement in  
7 December of '05?

8 A. December '05, the development agreement?

9 Q. Well, the development agreement was in December of  
09:06:32 10 '04, right?

11 A. December '04. Right.

12 Q. And then the license agreement was in December of  
13 '05?

14 A. You're correct.

09:06:37 15 Q. And I'm sorry we're going back and forth on this,  
16 but I think this is an important point. It is very  
17 basic. It should be clear.

18 You're not aware of any direct contact  
19 between SAP on the one hand and Hodell on the other prior  
09:06:52 20 to the December 2005 license agreement?

21 A. Correct.

22 Q. And you're likewise not aware of any direct contact  
23 between SAP on the one hand and Hodell on the other hand  
24 prior to go-live, which was in March of 2007? You're not  
09:07:03 25 aware?



1 A. I personally am not aware of it.

2 Q. Thank you.

3 Now, LSi had what's known as a distribution  
4 agreement with SAP, isn't that right?

09:07:15 5 A. What was that again?

6 Q. Your company, LSi --

7 A. Right.

8 Q. -- had what's known as a distribution agreement  
9 with SAP, right?

09:07:27 10 A. Is that the partner agreement? Is that the same  
11 thing?

12 Q. I think you might call it the partner agreement.

13 Let's take a look at it. Okay. Can you  
14 call up Exhibit 30, please.

09:07:49 15 Can you show the whole document just so we  
16 can kind of orient Mr. Lowery.

17 When you show the whole document, it is  
18 harder to read, but I think you probably recognize this  
19 as what you call a channel partner agreement?

09:08:04 20 A. Yes.

21 Q. The title of it -- we'll call up the top of it,  
22 Bob, please.

23 A. Do you want me to read it?

24 Q. That's okay. I will once we call it up. This  
09:08:23 25 screen is delaying. Thank you.

1 The title is SAP Business One Software  
2 Marketing and Distribution Agreement, right?

3 A. Correct.

4 Q. And this was a contract between your company, LSi,  
09:08:33 5 and SAP, and you can see right at the top, this agreement  
6 was made the 19th of December --

7 A. Correct.

8 Q. My screen is blank, so I will try and -- thank you.  
9 There we go.

09:08:49 10 This agreement is made effective the 19th  
11 day of December, by and between SAP America, et cetera,  
12 et cetera, and LSi Lowery.

13 That is your company, right?

14 A. That is correct.

09:08:58 15 Q. If I look at the end of this document, right, I  
16 would see that you signed it?

17 A. There is no signature, but --

18 Q. Why don't we go, Bob, all the way --

19 A. Okay.

09:09:09 20 Q. -- to the page that is Bates labeled LSi 42, also  
21 has section 17.8 in it.

22 It is a minor point, but I want the jury to  
23 understand, this is a contract between your company, LSi,  
24 and SAP and you signed it?

09:09:33 25 A. Did I? Is that the one I signed?

1                   Because I don't have that up here. I'm not  
2                   doubting you. I just don't see it.

3           Q.       I understand. We're having some -- this screen --

4           A.       My screen is blank.

09:09:50 5                   THE COURT: They are all blank now.

6                   Let's see here.

7           BY MR. MILLER:

8           Q.       Maybe -- how about this. If I told you that I'm  
9                   staring at the signature page --

09:10:08 10          A.       I believe you.

11          Q.       -- and there is a bunch of pen and is right over  
12                   your name and says "Dan Lowery," do you believe that you  
13                   signed that contract?

14          A.       Lawyers do not lie. I believe you.

09:10:18 15          Q.       Thank you.

16                   All right. Well, then let's try and move  
17                   on.

18                   This distribution agreement that --

19                   THE COURT: Excuse me.

09:10:24 20                   Are you on the front table computer or the  
21                   rear? It's on. Let me try the rear.

22                   MR. MILLER: Mine is blank, Your Honor.

23                   THE COURT: They are all blank.

24                   THE WITNESS: Mine just flashed "no signal  
09:10:44 25                   detected."

1 MR. MILLER: It is like back in the 1700s.  
2 That was an attempt at humor.

3 THE COURT: We'll see if we can get Dave up  
4 here.

09:16:22 5 THE JURY: Can we stand up?

6 THE COURT: Absolutely. It will take a  
7 while.

8 Why don't we question on other stuff in the  
9 interim. I was thinking, too, you can bring your coffee  
09:11:25 10 in here if you want in the morning.

11 THE JURY: They told us no.

12 THE COURT: Who is they?

13 THE JURY: The young lady.

14 THE COURT: I better check. It probably  
09:11:36 15 depends on what is going on.

16 THE WITNESS: Okay. My screen is up.

17 THE COURT: We are becoming familiar now.

18 Maybe if you want to do it.

19 BY MR. MILLER:

09:12:05 20 Q. All right. So this agreement, this distribution  
21 agreement basically permitted --

22 A. I do want to note, it is not signed by SAP. Does  
23 that matter?

24 Q. If I asked you to look at the next page, I know  
09:12:19 25 there is a copy of that same signature page and it was

1 signed by SAP --

2 A. Okay.

3 Q. -- would you believe me?

4 A. I would believe you.

09:12:26 5 Q. Should I save us the time of going there?

6 A. Save the time.

7 Q. Trust me -- thank you -- SAP signed the contract.

8 This was the distribution agreement that allowed LSi to

9 go out in the world figure out what customer's business

09:16:22 10 requirements were and sell B1 to them, right?

11 A. Yes.

12 Q. And the idea -- and this is I think the point you

13 were making yesterday -- SAP didn't just let anybody go

14 out in the world and sell their B1 product right? I

09:16:22 15 mean, there were requirements to qualify as having a

16 right to sign this agreement. SAP just didn't pick

17 people up off the street and ask them to sign these

18 distribution agreements and send them out there, right?

19 A. I would hope not.

09:16:22 20 Q. Well, you testified yesterday that it was a badge  
21 of honor --

22 A. It was. I just don't know the requirements they  
23 had. They never said you have to do these four things.

24 Q. I want the jury to understand the setting and

09:16:22 25 context of the comment you made yesterday. You said it

1 was a badge of honor --

2 A. It was.

3 Q. To be recruited by SAP and asked to sign one of  
4 these distribution agreements, right?

09:16:22 5 A. Right. I just don't know what the requirements  
6 were.

7 Q. I understand and I have not asked you if you knew  
8 what the requirements were. I just wanted to be clear--

9 A. I thought you were.

09:16:22 10 Q. I'm sorry. It was a badge of honor to be recruited  
11 by SAP and asked to sign one of these agreements right?

12 A. It was.

13 Q. And you have been on the sales side of the computer  
14 business for 43 years, right?

09:16:22 15 A. Yes, sir.

16 Q. And regardless of exactly what SAP stand cards were  
17 and we're going to hear about that at these trials, you  
18 believed that LSi certainly met those standards because  
19 you testified yesterday that LSi was a high quality  
09:16:23 20 partner. Right?

21 A. Yes.

22 Q. In fact, you said that the -- I don't want to  
23 -- I'm going to try and remember exactly what you said,  
24 but see how close I get.

09:16:23 25 You said that the hotel team that you ^

1       Hodell team that you had was the best team you had ever  
2       had in the 40 some odd years you had in the software  
3       business?

4       A.     It was.

09:16:23 5       Q.     And then yesterday, Mr. Lambert took you through a  
6       bunch of sections of this distribution agreement, right?  
7       Do you remember that? You were kind of reading section  
8       after section. You read section 4.7, 4.10, 9.1 on  
9       training, correct?

09:16:23 10      A.     I remember that, yes.

11      Q.     And these were a series of paragraphs, we all  
12      remember from yesterday, about actual obligations that  
13      companies like LSi, who were acting as dealers, would  
14      have under this distribution agreement.

09:16:23 15      A.     I remember that.

16      Q.     Right? Things that they had to do, right?

17      A.     Yes.

18      Q.     And Mr. Lambert of course was very impressed with  
19      the fact that the agreement also permitted dealers like  
09:16:23 20      LSi to use the SAP logo, right?

21      A.     Yes.

22      Q.     But you're aware that this agreement consistent  
23      with a lot of the sections you were reading yesterday had  
24      significant restrictions, not just on how you could use  
09:16:24 25      the logo, were you on how you acted and operated out in

1 the world selling the B1 product. Right?

2 A. Do I -- where is that at?

3 Q. Well, let's start with the fact that this contract  
4 permitted you only to sell SAP Business One at your own  
09:16:43 5 risk and for your own account. Correct?

6 A. Does it say that.

7 Q. Well, I'll show you where it says that. Why don't  
8 we go to Section 2.6.

9 A. In this?

09:16:57 10 Q. Yes. It would be called up on the screen for you.

11 A. 216?

12 Q. It is 2.6. Mr. Lowery, I --

13 A. I'm sorry.

14 Q. We're going to mostly use the electronic screen. I  
09:17:09 15 have a couple of papers here, but there are so many of  
16 them, we would be back and forth flipping tab to tab, so  
17 we're going to try to work just off the computer. Okay?

18 A. Okay. 2.6 is up on my screen.

19 Q. Okay. And Section 2.6, in the contract that LSi  
09:17:25 20 signed with SAP about selling Business One says, under  
21 best efforts, resellers shall use its best efforts to  
22 market and license the software and market and provide  
23 maintenance and support services, period. All caps.  
24 Reseller, that's LSi right?

09:17:42 25 A. Correct.



1 Q. Reseller does so at its own risk and for its own  
2 account except as otherwise set forth herein. Correct?

3 A. Correct.

4 Q. Let's take a look at a note, that is language that  
09:17:54 5 was not just in the contract, but it is a contract that  
6 you signed and you agreed to.

7 A. Correct.

8 Q. On behalf of LSi, right?

9 A. Correct.

09:18:01 10 Q. Let's take a look, Bob, at Section 12.3.

11 Section 12.3, sir, again, in the contract  
12 that LSi through you signed with SAP to sell Business One  
13 at 12.3 under "no representations or warranties" said  
14 "reseller shall not make any representations or  
09:18:42 15 warranties as to the performance of the software  
16 maintenance or other services on behalf of SAP or SAP AG  
17 -- did everyone lose the screen there or is it just me?  
18 Just me.

19 A. You're reading it correctly.

09:18:58 20 Q. Yes. And the final sentence, "SAP's warranty  
21 obligations limitations and liabilities related to the  
22 SAP end user license agreement with the reseller shall be  
23 solely as stated herein." That was language in the  
24 contract and language that you agreed to correct?

09:19:13 25 A. Correct.

1 Q. Okay. Take a look at Section 17.8, please.

2 There is your signature at the bottom.

3 A. I saw that.

09:19:40

4 Q. Section 17.8, sir, you would agree that in the  
5 contract that your company, LSi, had with SAP to sell  
6 Business One stated under republic, reseller, that's LSi  
7 is an independent contractor and is not an agent employee  
8 or legal representative of SAP. Reseller -- mine just  
9 disappeared again. I can continue. Do you have it up on  
10 the screen?

09:20:02

11 A. I do. Do you want me to read it?

09:20:14

12 Q. No. It came back. Reseller expressly acknowledges  
13 that it has no power or authority to accept any order for  
14 SAP, or to make guarantees or warranties concerning the  
15 software or the delivery thereof, or to make any  
16 commitment for SAP or to obligate SAP in any respect  
17 whatsoever, reseller agrees to indemnify SAP and to hold  
18 SAP harmless from and against any loss claims damages  
19 fees, including attorney's fees or award arising from any  
20 breach of this agreement, including but not limited to  
21 any violation of actions in excess of resellers's  
22 authority hereunder and arising out of any claims by any  
23 reseller licensees. This agreement shall not be  
24 construed as creating a partnership, joint venture,  
09:20:46 25 agency relationship, or granting a franchise under any

1 applicable laws.

2 Do you see that there?

3 A. I do.

4 Q. I read it correctly?

09:20:54 5 A. I did.

6 Q. And you agreed to that when you signed the contract  
7 with SAP, right?

8 A. I did.

9 Q. Okay. Take a look -- you would agree that the  
09:21:04 10 license -- when you sell Business One to customers,  
11 right, they execute license agreements with SAP?

12 A. Correct.

13 Q. So the way this works is you have a contract with  
14 SAP that allows you to distribute Business One, correct?

09:21:20 15 A. Correct.

16 Q. And when you find a customer that decides to buy  
17 the Business One product they actually execute a license  
18 agreement between them and SAP, right?

19 A. Correct.

09:21:27 20 Q. And the license agreements are a pretty standard  
21 form, the language is typically the same from one  
22 customer to another, except they are buying different  
23 numbers of users, users of B1, correct?

24 A. Correct.

09:21:39 25 Q. Can we please take a look at Exhibit 316?

1 Exhibit 316 is the license agreement  
2 between SAP and Hodell? Do you see at the top there?

3 A. Yes.

4 Q. I want the jury to be following every part of this.  
09:22:00 5 Of course my screen is blank. Thank you.

6 The top of it says "this agreement is made  
7 effective as of the 23rd of December, '05, by and  
8 between SAP -- right -- and Hodell?

9 A. Correct.

09:22:12 10 MR. LAMBERT: Your Honor, I object. He  
11 doesn't established he has any personal knowledge of this  
12 agreement.

13 THE COURT: Ask him if he knows anything  
14 about it.

09:22:18 15 BY MR. MILLER:

16 Q. Do you know anything about the license agreement  
17 between SAP and Hodell?

18 A. I know it was executed.

19 Q. Right. I mean, you were selling the B1 -- IBIS/Lsi  
09:22:32 20 was selling the B1 product to Hodell, they would have  
21 seen the license agreement right?

22 A. Yes.

23 Q. And you are the majority owner of LSi and the  
24 president of IBIS?

09:22:43 25 A. Yes.

1 Q. So you are familiar with this license agreement?

2 A. Yes.

3 Q. And I'm just pointing out to make sure the jury  
4 understands that this is a contract between SAP and  
09:22:53 5 Hodell, right, signed or filled out here December 23,  
6 2005?

7 MR. LAMBERT: Objection.

8 THE COURT: Overruled.

9 A. Yes.

09:22:59 10 Q. Thank you. Take a look at Section 4.1, please.

11 Just so the jury understands, we've  
12 explained these license agreements are executed when  
13 customers buy B1 and the language in them --

14 MR. LAMBERT: Objection.

09:23:22 15 MR. MILLER: Your Honor, we just covered  
16 this.

17 MS. LUARDE: He is testifying for the jury.

18 MR. LAMBERT: He is testifying, Your Honor.

19 THE COURT: He took a page from your book,

09:23:31 20 I think, ask a straightforward question if you would.

21 BY MR. MILLER:

22 Q. We already covered this. The language that is in  
23 this license agreement that Hodell signed is just like  
24 the language that you see in license agreements that lots  
09:23:43 25 of customers sign. The license agreement forms, you just

1 admitted, are basically the same --

2 THE COURT: All right. You just asked four  
3 questions.

4 MR. MILLER: Forgive me.

09:23:52 5 THE COURT: Ask one. One at a time.

6 MR. MILLER: Thank you, Your Honor.

7 BY MR. MILLER:

8 Q. The license agreement is a form document, right?

9 A. Correct.

09:23:58 10 Q. It is basically a template. Correct?

11 A. Okay.

12 Q. And customers who buy B1, they are all required to  
13 execute license agreements?

14 A. They are.

09:24:10 15 Q. And they all pretty much look like this one.

16 A. All the B1 customers.

17 Q. Yes?

18 A. Yes.

19 Q. And they all pretty much look like this one, 316?

09:24:19 20 A. Unless somebody legalizes it up or something.

21 Q. But that rarely occurs, correct?

22 A. Rare occurrence.

23 Q. That's all I'm trying to establish. Now I want to  
24 look at Section 4.1.

09:24:32 25 You would agree, sir, that in this license

1 agreement that Hodell signed, that just like the license  
2 agreement that all customers sign, under Section 4, it  
3 says SAP reseller relationship/price and payment,  
4 licensee acknowledges and agrees that the SAP reseller  
09:24:51 5 through which licensee has arranged for the procurement  
6 of this agreement -- from which licensee receives any  
7 services related to the software, is not the agent of  
8 SAP. The SAP reseller is an independent company, person,  
9 or entity with no authority to bind SAP or make  
09:25:14 10 representations or warranty on behalf of SAP.

11 You see that there, right?

12 A. I do.

13 Q. And that was in all of the sales that IBIS/Lsi ever  
14 made of B1 to -- to B1 customers?

09:25:30 15 A. To the best of my knowledge.

16 Q. Thank you. Your team at IBIS/Lsi, they had through  
17 the training and the things we talked about had  
18 specialized skill and knowledge to implement software.  
19 Right?

09:25:46 20 A. Correct.

21 Q. And you would agree that implementing software at a  
22 corporation, that's a complicated undertaking and it  
23 requires specialized skill.

24 A. Yes.

09:26:27 25 Q. And IBIS/Lsi, they owned the services that the team

1 used, or they -- they may have been leasing them, but  
2 IBIS/Lsi's office, the IBIS/Lsi people were working from,  
3 who worked on the hotel project?

4 Q. Did they work at offices of mine?

09:27:01 5 A. I want to be clear. When people on your team were  
6 working on the hotel project, they worked out of your  
7 offices?

8 A. They did.

9 Q. They were not working out of SAP's offices?

09:27:26 10 A. Yes.

11 Q. So when they were using computers and desks and  
12 chairs and pens and pencils, they were not using SAP's  
13 computers and desks and chairs and pens and pencils,  
14 right?

09:27:26 15 A. That's correct.

16 Q. They were using IBIS/Lsi's basically assets to  
17 perform this implementation, correct?

18 A. That's correct.

19 Q. And the team that you had on the Hodell project,  
09:27:26 20 they were IBIS/Lsi employees.

21 A. They were what?

22 Q. IBIS/Lsi. Right?

23 A. Yes.

24 Q. IBIS/Lsi hired those people?

09:27:26 25 A. Yes.



1 Q. And IBIS/Lsi could fire those people.

2 A. Did you say that we fired them?

3 Q. No. I just want to be clear that the Hodell team,  
4 your Hodell team, they were IBIS/Lsi employees --

09:27:26 5 A. Yes.

6 Q. And it was IBIS/Lsi that hired these people and  
7 could fire these people if they want to.

8 A. Oh, yes.

9 Q. IBIS/Lsi paid them benefits --

09:27:28 10 A. Yes.

11 Q. IBIS/Lsi controlled their hours, whether they went  
12 on vacation or not. All of that was controlled by  
13 IBIS/Lsi.

14 A. Correct.

09:27:35 15 Q. Not controlled by SAP?

16 A. Correct.

17 Q. Because IBIS/Lsi was an independent company and  
18 entity from SAP?

19 A. Correct.

09:27:44 20 Q. And IBIS/Lsi was in charge of the project.

21 A. Yes.

22 Q. Now, you read yesterday from Exhibit 32 -- can we  
23 call that up, please?

24 I'll represent for the record, Exhibit 32,  
09:28:16 25 that you read from yesterday, that is a contract between

1 IBIS and SAP known as a software development kit, but  
2 let's look at it?

3 A. Okay.

4 Q. Go up to the top of it, please.

09:28:32 5 Do you see the title, right "limited term,  
6 SAP Business One software development kit license." Do  
7 you see that there?

8 A. I do.

9 Q. And you know that's where people get SDK, software  
09:28:46 10 development kit?

11 A. I do.

12 Q. You would understand what I meant if I called this  
13 an SDK contract?

14 A. I do.

09:28:52 15 Q. And this one here, effective, I think it reads 31st  
16 day of December, '03, this one is actually between IBIS  
17 on the one hand and SAP on the other. Right?

18 A. Correct.

19 Q. And what these SDKs do is they permit dealers like  
09:29:11 20 IBIS or like LSi to develop add-ons to go on top of  
21 Business One to provide functionality to customers that  
22 Business One doesn't provide. Right?

23 A. Yes.

24 Q. Okay. Take a look, please, at Section 8 -- uh-oh?

09:29:38 25 And just to be clear, looking at the title

1 of this, this is the IBIS SDK.

2 A. Yes. This document was before I acquired IBIS.

3 Q. I understand. And I want the jury to understand.

4 So we talked about LSi's distribution agreement. And you

09:29:57 5 just testified LSi also had one of these SDKs?

6 A. We had one too.

7 Q. And all we're talking about now is the IBIS SDK?

8 A. Right.

9 Q. And it is likely the same as the one you executed,

09:30:16 10 right?

11 A. Best of my knowledge.

12 Q. Let's look at Section 8?

13 A. Okay.

14 Q. You would agree, sir, that IBIS and LSi agreed to

09:30:30 15 this language up on everybody's screen except for mine

16 that says disclaimer of warranty. "SAP disclaims all

17 warranties, express or implied at law or in equity

18 related to the SAP Business One software, software

19 development kit, documentation, SAP proprietary

09:30:47 20 information, licensee extensions, and any third party

21 software." Do you see that there?

22 A. I do.

23 Q. And if you look at the front of this agreement

24 there is a definition section. Right?

09:30:59 25 A. Okay.

1 Q. Go to the first page, please.

2 This will just take a second but it is  
3 worth doing.

4 All the way down at the bottom where it  
09:31:13 5 says -- highlight the very final line. It says  
6 "extension means."

7 And now we go to the next page and see the  
8 definition, right?

9 A. Okay.

09:31:23 10 Q. Can you go to the next page, please? Up top.

11 Can you highlight the two top paragraphs,  
12 the ones that are indented?

13 I want to be clear, in the SDK there is a  
14 definition of an extension. This is the extension and it  
09:31:47 15 looks technical, but what we are basically talking about  
16 are add-ons, right?

17 A. We're talking about what?

18 Q. This definition of an extension that's on the  
19 screen in front of you --

09:31:57 20 A. Yes.

21 Q. Looks pretty technical but is basically a  
22 description of an add-on?

23 A. An add-on, okay? Do you want me to read it and  
24 make sure.

09:32:06 25 Q. Take your time. You don't have to read it out

1 loud?

2 A. You're correct. No, no. You're correct. I just  
3 didn't -- I didn't know what you were trying to ask for.

4 Q. Okay. I just want everyone in this courtroom to  
09:32:16 5 understand in this contract, when it uses the word  
6 extension it is talking about an add-on.

7 A. That's correct.

8 Q. So very quickly, let's go back to Section 8. We  
9 had this disclaimer of warranty piece. Can you blow up  
09:32:41 10 Section 8, please?

11 The one I read a moment ago. It starts  
12 "SAP disclaims all warranties," et cetera, et cetera,  
13 and in the fourth line says -- well, disclaims all  
14 warranties related to the SAP Business One software,  
09:32:59 15 software development kit, documentation, SAP proprietary  
16 information, licensee extensions, and any third party  
17 software.

18 So SAP in the SDK is disclaiming all  
19 responsibility and liability for the add-ons. Correct?

09:33:14 20 A. Yes.

21 Q. And you agreed to that when LSi signed its SDK?

22 A. I did.

23 Q. And IBIS agreed to that when they signed their SDK.  
24 Correct?

09:33:26 25 A. Correct.

1 Q. Take a quick look again, please, at 316.

2 Go to 7.1, please.

3 Just to be clear, Exhibit 316 is the Hodell  
4 license agreement, right? We looked at that just a  
09:33:52 5 couple minutes ago?

6 A. Correct.

7 Q. If you go to Section 7.1, you would agree that  
8 under the heading "performance warranty maintenance,"  
9 7.1 reads "SAP warrants that the software will  
09:34:15 10 substantially conform to the functional specifications  
11 contained in the documentation for six months following  
12 delivery. The warranty shall not apply, one, if the  
13 software is not used in accordance with the  
14 documentation, or, two, if the defect is caused by a  
09:34:29 15 modification, integration add-on, licensee, third party  
16 software, or third party database." Do you see that  
17 there?

18 A. I do.

19 Q. And when it refers to, in that last piece of the  
09:34:42 20 sentence, "an integration add-on," that's basically  
21 something like In-Flight Enterprise. Correct?

22 A. It is.

23 Q. So not only is it true that SAP disclaims liability  
24 and responsibility for add-ons in the SDK but SAP in its  
09:34:59 25 license agreement with Hodell and with its other

1 customers disclaims liability and responsibility for  
2 add-ons there to. Correct?

3 A. Correct.

4 Q. Okay. Yesterday, by the way, I want to shift gears  
09:35:14 5 just a little bit.

6 You said repeatedly that IBIS was a  
7 reseller, as if they had a distribution contract with  
8 SAP, just like LSi did. That's what you said yesterday,  
9 right?

09:35:29 10 A. I apologize. IBIS was a what?

11 Q. I just want to be clear?

12 A. I just didn't hear.

13 Q. No problem. Yesterday, you testified repeatedly  
14 that IBIS had a channel partner or distribution agreement  
09:35:47 15 with SAP, right?

16 A. Correct.

17 Q. So your testimony from yesterday was -- well, just  
18 so everyone is following, you have testified today and we  
19 just walked through this quite a bit that LSi had a  
09:36:00 20 distribution agreement and an SDK --

21 A. Correct.

22 Q. Right? And we talked about IBIS, they have an SDK.  
23 We just looked at it, right?

24 And yesterday you were testifying, oh,  
09:36:12 25 yeah, not only does IBIS have an SDK, they have one of

1 these distribution agreements too. Correct?

2 A. Correct.

3 Q. Okay. And you're the president of IBIS, so, I  
4 mean, that's not without any foundation that you say  
09:36:27 5 that. You would know, right?

6 A. Yes.

7 Q. And you have been involved in this lawsuit since it  
8 started, right, in November of 2008?

9 A. Yes.

09:36:37 10 Q. I'm sorry. You have to answer, because they are  
11 taking down all the words, so I know when you are nodding  
12 your head, everybody knows you mean yes?

13 A. Yes. The answer is yes.

14 Q. Thank you. But you're aware that neither IBIS nor  
09:36:52 15 LSi nor SAP nor Hodell have been able to find or produce  
16 a draft, original, final, any version whatsoever of any  
17 IBIS distribution agreement. Nobody has found one.

18 MR. LAMBERT: Objection.

19 BY MR. MILLER:

09:37:15 20 Q. Correct?

21 THE COURT: Overruled.

22 A. I don't know that.

23 Q. You have been in this case since November, 2008.  
24 Right?

09:37:20 25 A. Correct.



1 Q. You can't tell this jury that you have seen an IBIS  
2 distribution agreement, can you? Because I certainly  
3 haven't and no one else at counsel table has seen it.  
4 Correct?

09:37:33 5 MR. LAMBERT: Objection.

6 THE COURT: But you're asking multiple  
7 questions.

8 MR. MILLER: That's fine. I'll slowdown.

9 BY MR. MILLER:

09:37:42 10 Q. You have been in the lawsuit since November of  
11 2008. Right?

12 A. Correct.

13 Q. Just -- and I realize that it may have been that  
14 you had an understanding that IBIS had a distribution  
09:37:55 15 agreement, but you can't tell us that you have actually  
16 seen an IBIS distribution agreement.

17 A. No.

18 Q. Meaning you can't tell us that you have seen  
19 -- that I'm correct. You can't tell us that you have  
09:38:08 20 seen one.

21 A. That's correct.

22 Q. Okay. And if I told you that IBIS didn't have a  
23 distribution agreement, you couldn't point to any  
24 evidence that I was wrong?

09:38:21 25 A. No.

1 Q. Okay. And an SDK contract, that's a different  
2 thing from a distribution agreement. Right?

3 A. Yes.

4 Q. Because the distribution agreement is what permits  
09:38:39 5 the reseller to go out and sell the B1 product to the  
6 customer. Right?

7 A. Yes.

8 Q. And the SDK is what permits that dealer, reseller,  
9 channel partner, whatever we are calling them, the SDK is  
09:38:53 10 what permits that entity to develop add-ons. Right?

11 A. Correct.

12 Q. Take a look at Exhibit 32.

13 Again, this is the IBIS SDK. Right? The  
14 only contract we've seen between IBIS on the one hand and  
09:39:18 15 SAP on the other hand. Right?

16 A. Correct.

17 Q. Okay. Look at Section 5.2, please.

18 5.2, sir, in the SDK contract that IBIS had  
19 with SAP, under termination it says "this agreement and  
09:39:46 20 the license granted hereunder shall terminate upon the  
21 earliest to occur of the following," and number one, 180  
22 days from the date of this agreement in the event there  
23 is no written agreement between SAP and licensee  
24 establishing licensee as an authorized SAP Business One  
09:40:06 25 software partner, partner agreement, by the end of such

1 180 day period.

2 Do you see that there?

3 A. I do.

09:40:22

4 Q. So if IBIS had this SDK executed in December of  
5 2003 and we've established that, right?

6 A. Correct.

7 Q. They had an SDK, it is this one right here, and it  
8 was executed in December of 2003. Right?

9 A. Correct.

09:40:30

10 Q. If IBIS didn't go ahead and get a distribution  
11 agreement, then according to the language we just  
12 reviewed at 5.2, IBIS's SDK terminates after 180 days.  
13 Right?

14 A. Yes.

09:40:49

15 MR. LAMBERT: Objection.

16 THE COURT: Overruled.

17 BY MR. MILLER:

18 Q. So by June of 2004, if IBIS doesn't have a  
19 distribution agreement, IBIS has zero contracts with SAP.  
20 Right?

09:41:02

21 A. Correct.

22 Q. Shifting gears just a little bit more, after this  
23 SDK agreement was executed, that's when LSi came in and  
24 acquired IBIS, right, in April/May 2004. Right?

09:41:29

25 A. Correct.

1 Q. But IBIS after it was acquired by LSi continued to  
2 conduct business. Right?

3 A. As IBIS?

4 Q. Correct.

09:41:38 5 A. I'm not sure what that means. We bought all assets  
6 of IBIS.

7 Q. Well, let's break it down a little bit. LSi --

8 A. Help me out here.

9 Q. We'll work together.

09:41:51 10 A. Hmm?

11 Q. We'll work together?

12 A. Okay.

13 Q. LSi you testified yesterday, it still exists.

14 A. It still exists.

09:41:58 15 Q. Right. And when LSi acquired IBIS, it wasn't some  
16 fancy corporate transaction. LSi just bought the stock  
17 of IBIS and IBIS became a subsidiary of LSi, right?

18 A. Okay.

19 Q. You tell me.

09:42:13 20 A. I think so.

21 Q. Okay.

22 A. Remember, I'm the dumb salesman.

23 Q. But you're the owner of these companies, right?

24 A. I am the owner of the companies.

09:42:21 25 Q. Thank you, sir. And IBIS continued to conduct

1 business as IBIS after LSi acquired IBIS. Right?

2 A. I don't know how to answer that, because --

3 Q. Okay, then let's look at some documents.

4 A. The switch to LSi was all marketing materials.

09:42:38 5 Q. Would you disagree with Dale Van Leeuwen said that  
6 IBIS continued to conduct business after the acquisition  
7 of LSi by IBIS?

8 MR. LAMBERT: Objection.

9 THE COURT: Objection sustained.

09:42:48 10 A. I have no idea what Dale says.

11 THE COURT: You don't have to answer.

12 BY MR. MILLER:

13 Q. No problem. Let's look at Exhibit 9, please.

14 Exhibit 9, I'll represent for the record,  
09:43:04 15 it is an October 14, 2004 IBIS letter to Hodell.

16 Can you isolate that? It is on IBIS  
17 letterhead.

18 A. The letterhead of IBIS, right.

19 Q. Can you isolate, Bob, down on the bottom who signed  
09:43:21 20 it?

21 A. No one signed it but it has my name and Dale's  
22 name.

23 Q. Thank you, sir, and you're correct, but I didn't  
24 have appending question.

09:43:28 25 Bob, can you please isolate at the

1 bottom--

2 A. He did.

3 Q. The names of the senders of this letter. And you  
4 see that down there, at the bottom of the document that  
09:43:42 5 has IBIS at the top, it has the name of two people.

6 Right?

7 A. Correct.

8 Q. One of them is Dale Van Leeuwen, correct?

9 A. Correct.

09:43:51 10 Q. And he is described as the COO of The IBIS Group.

11 Right?

12 A. Correct.

13 Q. And below that, that is your name, Dan Lowery,  
14 president of The IBIS Group, correct?

09:44:02 15 A. Yes.

16 Q. And the date of this is October 14, 2004?

17 A. Okay.

18 Q. Can we show the date? It's in the upper right-hand  
19 corner. Okay.

09:44:10 20 So LSi acquires IBIS in April or May of  
21 2004. This is five or six months later, correct?

22 A. Correct.

23 Q. And clearly IBIS is continuing to conduct business  
24 because here you are sending a letter to Hodell on IBIS  
09:44:28 25 letterhead with your name on the bottom described as the

1 president of IBIS, right?

2 A. Yes, correct.

3 Q. Take a look at Exhibit 11. This, by the way,  
4 appears to be the attachment to Exhibit 9, and it  
09:44:48 5 likewise has the IBIS letterhead. Correct?

6 A. Correct.

7 Q. And this was basically the first proposal that  
8 IBIS/LSi was making to Hodell for this entire project.

9 A. Okay.

09:45:07 10 Q. Take a look. I'll make it even easier. Why don't  
11 we take a look at Exhibit 291, please.

12 Sir, this is the development agreement,  
13 correct?

14 A. Correct.

09:45:27 15 Q. This is the December, 2004 development agreement.  
16 Right?

17 A. Correct.

18 Q. Let's look at who it is between, we'll start with  
19 some really, really simple stuff. It is right there at  
09:45:38 20 the top.

21 Development agreement between Hodell-Natco,  
22 The IBIS Group, a wholly-owned company of LSi Lowery  
23 Systems and LSi Lowery Systems?

24 A. Right.

09:45:53 25 Q. And that's who this contract that you signed on

1       behalf of IBIS and LSi was between?

2       A.     Correct.

3       Q.     And it can be a little complicated, that kind of  
4       language at the top.

09:46:02 5                     It is Hodell, correct, is one party?

6       A.     Yes.

7       Q.     The second better is The IBIS Group?

8       A.     Correct.

9       Q.     And they are described there. What is IBIS, it is  
09:46:12 10       a wholly owned company of LSi?

11       A.     Right.

12       Q.     And the third party to the contract is LSi. Right?

13       A.     Okay.

14       Q.     And this, again, is December, 2004. Five, six  
09:46:25 15       months after LSi acquired IBIS.

16       A.     Correct.

17       Q.     And this, again, if it is December, 2004, is six  
18       months after the only remaining contract that existed  
19       between IBIS and SAP expired.

09:46:43 20       A.     In your opinion.

21       Q.     Based on the language that we read in IBIS's SDK.  
22       Correct?

23       A.     In my opinion, he had a contract. We just have not  
24       found it. Where is it?

09:46:55 25       Q.     Seven years in, no party has produced it. You're



1 still not sure if that existed or not?

2 A. I'm not sure that is true.

3 Q. If there was no distribution agreement --

4 A. I have already answered that.

09:47:08 5 Q. If there was no distribution contract between IBIS  
6 and SAP you would agree at the time this development  
7 agreement was signed in December of 2004, IBIS didn't  
8 have any contract with SAP. Correct?

9 MR. LAMBERT: Objection.

09:47:20 10 THE COURT: Overruled.

11 A. Well, I don't know what I'm allowed to say or not.

12 When we bought IBIS, SAP was ecstatic about  
13 it, they all loved it. So I don't know --

14 Q. Sir, you are going to get a chance, perhaps Hodell  
09:47:38 15 will want to ask you some questions like that.

16 I just want to be clear. If IBIS didn't  
17 have a distribution agreement, and I realize that you are  
18 not prepared to say they didn't have one --

19 A. Right.

09:47:49 20 Q. But if they didn't have a distribution agreement,  
21 you would agree based on the language we saw on their SDK  
22 --

23 A. I agree.

24 Q. Let me finish please. That their SDK expired in  
09:47:58 25 June of 2004. Correct?

1 A. Correct.

2 Q. And this development agreement is dated December,  
3 2004. Correct?

4 A. Correct.

09:48:05 5 Q. And that would have been six months after the only  
6 contract, if there is no distribution agreement, that  
7 IBIS ever had with SAP expired.

8 A. If all that was true, correct.

9 Q. Thank you. Let's talk about some of the risks  
09:48:20 10 associated with this project.

11 The solution, right, was going to involve  
12 three major components, correct?

13 A. Correct.

14 Q. B1, Radio Beacon -- correct?

09:48:35 15 A. Correct.

16 Q. And In-Flight Enterprise. Correct?

17 A. Correct.

18 Q. Let's start with B1. In 2003, when you were first  
19 getting going with SAP, B1 was a brand new product in the  
09:48:51 20 United States. Right?

21 A. Correct.

22 Q. It was a fresh product, and your company was aware  
23 of that. Right?

24 A. Correct.

09:48:59 25 Q. And IBIS and LSi, in your view, recognizing

1 -- taking for the moment the idea that IBIS had a  
2 distribution agreement, IBIS and LSi were some of the  
3 first companies signed up with SAP to sell this product.

4 A. Probably.

09:49:21 5 Q. And you knew that SAP had bought this product in  
6 Israel and they were going to roll it out in the United  
7 States.

8 A. Correct.

9 Q. And you knew that the B1 product had been in the  
09:49:34 10 United States for less than a year.

11 A. Correct.

12 Q. And you knew that there were very few, so far U.S.  
13 customers, because most of the customers were in Europe  
14 and Israel.

09:49:46 15 A. Correct.

16 Q. Elsewhere in the world at least, correct?

17 A. Elsewhere in the world? Is that what you said?

18 Q. Yes?

19 A. Yes.

09:49:55 20 Q. I asked a bad question. You knew that there were  
21 relatively few U.S. customers and the bulk of the  
22 customers for B1 were up until now throughout the rest of  
23 the world including Europe and Israel?

24 A. Correct.

09:50:10 25 Q. And you even testified yesterday that it was your

1 understanding that the Hodell deal was going to be one of  
2 the largest B1 deals that had occurred thus far?

3 A. That's what I was told.

4 Q. But that would have just been in the United States.  
09:50:24 5 Correct?

6 A. I don't know.

7 Q. You didn't know? But Hodell knew what you knew?  
8 Right? Hodell would have known -- if it was your  
9 understanding that this Hodell transaction was going to  
09:50:33 10 be one of the largest B1 sales in the United States,  
11 Hodell would have known that too.

12 A. I don't know.

13 Q. You would have told Hodell that.

14 A. Why would I tell them that?

09:50:43 15 Q. Do you think that that -- do you think that is  
16 something that is important for you to know when you are  
17 selling a product, that it has never -- I'll let you  
18 answer.

19 A. I don't know.

09:50:54 20 Q. How about all the things we just talked about?

21 A. You just asked me did I tell them. I can't answer  
22 I did. I don't know if I did.

23 Q. You don't remember?

24 A. I don't remember I was told that by Dan Kraus.

09:51:10 25 Q. Would it be fair to say the basics of what we just

1 covered, which is that B1 was relatively new in the  
2 United States, and that Hodell was possibly one of the  
3 largest U.S. B1 sales thus far? That's something that  
4 you knew for sure.

09:51:29

5 A. I knew.

6 Q. And you would agree that that is something that  
7 Hodell would want to know. I mean, you have been in the  
8 sales business for 43 years. Do you think that a  
9 customer might want to know that?

09:51:42

10 A. That they are a large customer?

11 Q. No. The things you knew about B1 that we just  
12 reviewed, that it was relatively new in the United States  
13 and this sale might have been one of the biggest ones in  
14 the United States yet, don't you think a customer, in  
15 your 43 years of experience, would want to know that?

09:51:54

16 A. Possibly.

17 Q. And you don't remember if you told Hodell that or  
18 not?

19 A. I'm sure I told them that it was a new product.

09:52:06

20 They knew that. What was the other thing? As far as  
21 being the largest customer, I don't know that I mentioned  
22 that to them.

23 Q. Let's talk about In-Flight.

24 By itself, right, B1 didn't have all of the  
25 functionality that Hodell needed?

09:52:24

1 A. Correct.

2 Q. So B1 is accounting software, basically, correct?

3 A. ERP system they call it.

4 Q. Let's back it up then. B1 is an ERP system

09:52:39 5 correct?

6 A. Accounting, back office the part of that.

7 Q. It is a significant part of what B1 offers,

8 correct?

9 A. Accounting.

09:52:45 10 Q. Well, accounting and back office functions like you

11 just mentioned.

12 A. Yes.

13 Q. Okay. And B1 doesn't offer a customer, not just

14 like Hodell, but customers generally, all the

09:52:57 15 functionality they need to run their business. B1 does

16 certain things and that's it.

17 A. I apologize if I don't understand. Are you saying

18 it was never sold vanilla, just as-is?

19 Q. No. No. I'm not saying that. I'll try to ask it

09:53:15 20 in an even simpler way.

21 You would agree that by itself, B1 didn't

22 have all the functionality that Hodell needed.

23 A. Correct.

24 Q. Okay. And just so we're clear, when we're talking

09:53:26 25 about functionality, we're talking about the different

1 types of tasks a piece of software can perform. Right?

2 A. Correct.

3 Q. I mean, if there is a universe of things the  
4 company needs to get done in its operations, when it came  
09:53:40 5 to Hodell it was clear B1 didn't do all of that, it only  
6 provided certain functions, they were going to need the  
7 rest of them done some other way. Right?

8 A. Correct.

9 Q. And In-Flight Enterprise is what is known as an  
09:53:52 10 add-on or an extension. We've talked about that?

11 A. Correct.

12 Q. And In-Flight was designed to provide the  
13 functionality to Hodell that B1 did not provide.

14 A. Correct.

09:54:04 15 Q. Okay. It was basically supposed to fill gaps in  
16 the functionality that the other software, B1, didn't  
17 fill.

18 A. Correct.

19 Q. And everybody knew that. Everybody knew that there  
09:54:15 20 was -- everybody in the Hodell transaction, including  
21 everyone at IBIS/Lsi and everyone at Hodell, that  
22 In-Flight was going to provide functionality that B1  
23 didn't.

24 A. Correct.

09:54:26 25 Q. And this new In-Flight Enterprise for B1, it was

1 distinct, a different thing than the In-Flight  
2 application that Hodell was using back when they were on  
3 FACTS. Right?

4 A. I'm sorry. Could you repeat that?

09:54:45 5 Q. Not a problem. I will slow it down.

6 Hodell used to be on a different computer  
7 system before they got B1, right?

8 A. Correct.

9 Q. And that was called FACTS, right?

09:54:56 10 A. Yes.

11 Q. And FACTS had an add-on also. Correct?

12 A. Yes.

13 Q. It was developed by IBIS?

14 A. Correct.

09:55:02 15 Q. And it was called In-Flight?

16 A. Correct.

17 Q. Okay. The In-Flight that worked with FACTS for  
18 Hodell back in the old days is different than the  
19 In-Flight Enterprise that was supposed to work with B1  
09:55:18 20 going forward for Hodell. Correct?

21 A. What do you mean by different?

22 Q. Well, you would agree that it was going to require  
23 code to be written from scratch.

24 A. Correct.

09:55:34 25 Q. And Hodell was aware of that?



1 A. Yes.

2 Q. And Hodell knew that when you write code from  
3 scratch, that means risk.

4 MR. LAMBERT: Objection, Your Honor.

09:55:45 5 THE COURT: Objection sustained.

6 BY MR. MILLER:

7 Q. You worked with Hodell to help sell this product,  
8 correct?

9 A. Yes.

09:55:53 10 Q. And you have interacted with Hodell during the  
11 course of this sale. Correct?

12 A. Yes.

13 Q. And you just testified that the In-Flight  
14 Enterprise code was going to have to be written from  
09:56:41 15 scratch.

16 A. Correct.

17 Q. And you know from your interactions with Hodell  
18 that they were aware that the In-Flight code, In-Flight  
19 Enterprise code was going to have to be written from  
09:56:53 20 scratch. Correct?

21 A. Yes.

22 Q. And you also knew from your interactions with  
23 Hodell that they knew that having the In-Flight  
24 Enterprise code written from scratch involved risk?

09:57:05 25 MR. LAMBERT: Objection.

1 THE COURT: Objection sustained.

2 BY MR. MILLER:

3 Q. You knew that this In-Flight Enterprise add-on was  
4 untested, right? It was brand new?

09:57:25 5 A. Yes.

6 Q. Yes to both questions?

7 A. In that context, yes.

8 Q. Pardon?

9 A. In that context, yes.

09:57:29 10 Q. This In-Flight Enterprise add-on was a customized  
11 piece of software that was going to fit on top of B1.  
12 Correct?

13 A. Correct.

14 Q. And that was untested; that had never happened  
09:57:46 15 before. No one had ever taken this code that was getting  
16 written from scratch --

17 A. Right. I'm not sure I understood the context.

18 Yes, that's correct.

19 Q. So just to be FLEER --

09:57:57 20 A. I just didn't want to get it so where we're saying  
21 we didn't test it.

22 Q. We're talking over each other. I'll try to  
23 slowdown.

24 The In-Flight Enterprise code that was  
09:58:13 25 written from scratch was going to be basically developed

1 into this In-Flight Enterprise somewhere, piece of  
2 customized software that would fit on top of B1, correct?

3 A. Correct.

4 Q. Okay. And this code that was written from scratch  
09:58:27 5 was untested because no one had ever done this before.  
6 That's what we mean when we say it was written from  
7 scratch?

8 A. Okay. Correct.

9 Q. And you know from your interactions with Hodell  
09:58:40 10 that Hodell knew this had never been tested?

11 MR. LAMBERT: Objection.

12 THE COURT: Why don't you ask him if he  
13 ever told Hodell that.

14 BY MR. MILLER:

09:58:46 15 Q. Did you ever tell Hodell that this In-Flight  
16 Enterprise code that was being written from scratch was  
17 being written from scratch?

18 A. I think it's intuitive.

19 Q. Right? And would it be intuitive then that it was  
09:59:01 20 untested? Would you have told them that it was untested?

21 A. What does that mean to you?

22 Q. Well, by its very nature it was brand new and it  
23 had not been used in the field, correct?

24 A. Is that what you mean when you say untested?

09:59:14 25 Q. Sure?

1 A. Yes.

2 Q. And Hodell was aware of that?

3 A. They knew that.

4 Q. And would it have been intuitive if SWER?

09:59:22 5 Software is being written from scratch and  
6 never been used before in the field that it entailed  
7 risk.

8 MR. LAMBERT: Objection.

9 THE COURT: Objection sustained.

09:59:31 10 MR. MILLER: Thank you, Your Honor. I will  
11 move on.

12 THE COURT: You keep asking what somebody  
13 else knows.

14 MR. MILLER: That's fine.

09:59:37 15 BY MR. MILLER:

16 Q. In any event this In-Flight Enterprise customized  
17 software was a major part of the Hodell project, correct?

18 A. It was.

19 Q. It was going to involve literally thousands of  
09:59:46 20 hours of hardworking coding by IBIS and LSi. Correct?

21 A. Correct.

22 Q. Let's take a look at Exhibit 11.

23 We looked at Exhibit 11 a couple minutes  
24 ago, correct?

10:00:14 25 A. Correct.

1 Q. This was the IBIS/Lsi proposal to Hodell for this  
2 project. Correct?

3 A. Correct.

4 Q. Take a look, please, about midway down, where it  
10:00:29 5 says the purchase of In-Flight Enterprise. It is the  
6 kind of second thing below "costs."

7 A. Yes. I see it.

8 Q. The purchase of In-Flight Enterprise, and below  
9 that it says 3816 hours. Do you see that there?

10:00:45 10 A. I do.

11 Q. So this was IBIS' estimate to Hodell of how much  
12 effort would be associated with writing this customized  
13 code from scratch that would become In-Flight Enterprise.  
14 Correct?

10:00:59 15 A. Correct.

16 Q. Okay. And the In-Flight coding, by the way, just  
17 to be clear, this is getting done by IBIS/Lsi, not SAP.  
18 Right?

19 A. Yes.

10:01:10 20 Q. So we have B1, we had In-Flight, and then the third  
21 component was Radio Beacon. Right?

22 A. Correct.

23 Q. And Radio Beacon is another add-on, right?

24 A. Yes.

10:01:31 25 Q. And SAP, they were not involved with Radio Beacon

1 either, were they?

2 A. I can't answer that.

3 Q. Let me ask it to you this way --

10:01:57

4 A. Because Radio Beacon -- Ross Elliott, the president  
5 of Acellos, which is Radio Beacon, worked with SAP. He  
6 was on their council, software council. When you say  
7 they didn't work with him, I don't know if that is true.

10:02:15

8 Q. Thank you. SAP is a big company. It has a lot of  
9 employees. I'm not surprised to hear that somebody from  
10 SAP knows somebody at Radio Beacon. You are not  
11 surprised either right?

12 MR. LAMBERT: Objection, Your Honor.

13 THE COURT: Objection sustained.

14 BY MR. MILLER:

10:02:21

15 Q. But when we talk about this project and the three  
16 components in this project that were B1, In-Flight, and  
17 Radio Beacon, you would agree with me that SAP wasn't  
18 involved with the Radio Beacon work that was being done  
19 by IBIS/Lsi for Hodell. Correct?

10:02:40

20 MR. LAMBERT: Objection.

21 MR. MILLER: I'm asking if he is aware.

22 THE COURT: Overruled.

23 BY MR. MILLER:

24 Q. Was it too long of a question?

10:02:52

25 A. Possibly. But let me think. This is for the

1 conversion of data for both the SBO and RB application.

2 Correct. I would say yes. That's correct.

3 Q. Thank you. And Radio Beacon, you have been here

4 the last couple of days, that was at the heart of the

10:03:15 5 dispute that was about to lead the litigation or appeared

6 to be about to lead the litigation between IBIS and

7 Hodell --

8 MR. LAMBERT: Objection.

9 BY MR. MILLER:

10:03:26 10 Q. -- in late 2003. Isn't that right?

11 THE COURT: Objection sustained.

12 BY MR. MILLER:

13 Q. Are you aware -- do you remember, you have been

14 here for the last couple days. Right?

10:03:36 15 A. I have.

16 Q. I'm sorry. And you heard the testimony about the

17 letters that were written and the e-mails that came from

18 Hodell to IBIS about problems with the e-WMS component

19 and Radio Beacon. Correct?

10:03:53 20 A. I did. I saw those.

21 Q. Okay. And you weren't copied on those, right,

22 because that would have been way before LSi took over

23 IBIS.

24 A. Correct.

10:04:04 25 Q. Okay. You heard that sitting here in the

1 courtroom. Correct?

2 A. Correct.

3 Q. Okay.

4 MR. MILLER: Your Honor, I have plenty more  
10:04:14 5 to go but now might be a good time to break.

6 THE COURT: When you say plenty more, what  
7 does that mean?

8 MR. MILLER: I have more cross-examination  
9 to go. I know we normally take a morning break. This  
10:04:29 10 might be an okay time to take a break or we can keep  
11 going.

12 THE COURT: Do you want to vote on that?  
13 Okay, we'll take a 15 or 20 minute break folks. Keep in  
14 mind the admonition. Should be should come to the door.  
10:04:41 15 We had a mistake yesterday because they didn't hear my  
16 signal. And there she is.

17 (Recess had.)

18 (Proceedings in presence of jury:)

19 THE COURT: You may continue.

10:28:16 20 MR. MILLER: Thank you, Your Honor.

21 BY MR. MILLER:

22 Q. Mr. Lowery, let's go back to some of the contracts.

23 A. Okay.

24 Q. Dealers that have a distribution agreement and an  
10:28:29 25 SDK, right, are permitted to sell B1 and develop these



1 add-ones, correct?

2 A. Correct.

3 Q. And you could combine if you had a distribution  
4 agreement and an SDK, B1 with an add-on and you could  
10:28:43 5 create something that you described before and others  
6 have described before as an industry vertical. Right?

7 A. Yes.

8 Q. And you know what an industry vertical means.  
9 Right?

10:28:54 10 A. Well, you mean like, it's an extension, it's an  
11 add-on?

12 Q. Just to be clear, it means developing, in this  
13 context, it means taking the B1 product, putting the  
14 add-on on top of it, and selling it not just to one  
10:29:14 15 customer, but selling it to multiple customers in the  
16 industry and in the world.

17 A. Correct. That was our goal.

18 Q. Okay. In other words, when you are developing an  
19 industry vertical in this context, you are taking B1 and  
10:29:32 20 putting customized software on top of it that is  
21 customized for that particular industry and then selling  
22 the product to the whole industry if you can.

23 A. If you can.

24 Q. And you liked industry verticals.

10:29:46 25 A. Do I like industry verticals? Yes.

1 Q. You testified that you liked industry verticals?

2 A. Yes, I did. I do.

3 Q. And you developed one before for the equipment  
4 rental industry. Isn't that right?

10:29:58 5 A. We did.

6 Q. That wasn't with B1?

7 A. No.

8 Q. But, it was the same idea. You took a software  
9 product, it was customized for the equipment rental  
10 industry, and then you sold it.

10:30:06

11 A. Correct.

12 Q. To lots of companies in the equipment rental  
13 industry?

14 A. Correct.

10:30:11 15 Q. And you wanted to do the same thing here with B1,  
16 Radio Beacon, and In-Flight on top. Correct?

17 A. Correct.

18 Q. And your view was we'll sell it to these other  
19 companies and take over the world?

10:30:22 20 A. Okay. Yes.

21 Q. You testified to that at your deposition.

22 A. Okay.

23 Q. Okay. Let's take a look at 291, please.

24 We've looked at this a couple times.

10:30:47 25 Hodell on the one hand and IBIS and LSi on the other hand

1 executed this development agreement in December of 2004.

2 Right?

3 A. Correct.

4 Q. Take a look at the project description, please. It

10:30:59 5 is right there at the top. Can you blow that up? It is

6 right below the date.

7 Project description. This will be the

8 development of The IBIS Group's IBIS In-Flight Enterprise

9 application and its integration into SAP Business One

10:31:22 10 software for Hodell-Natco. That was the project. Right?

11 A. Yes.

12 Q. And you would agree this is the only contract that

13 existed between IBIS on the one hand and Hodell on the

14 other hand?

10:31:40 15 MR. LAMBERT: Objection.

16 THE COURT: Overruled.

17 BY MR. MILLER:

18 Q. You're not aware of another contract that existed

19 between these parties, right?

10:31:46 20 A. Let me think a second. I believe there was

21 something if we didn't meet certain milestones, we would

22 have to pay it back, this and that. That may have been

23 in this contract, I don't know. Hold that open, I'm just

24 saying. There might have been another contract on

10:32:11 25 performance.

1 Q. Just to be clear, this contract goes on for  
2 multiple pages, correct?

3 A. Yes.

4 Q. With all sorts of issues, right?

10:32:19 5 A. Yes.

6 Q. And sitting here right now, for lack of a better  
7 way of approaching this, you can't point to or describe  
8 for the jury some other contract that existed between --

9 A. Not as I sit here right now.

10:32:33 10 Q. -- Hodell and these parties? Okay.

11 And you would agree that IBIS/Lsi and  
12 Hodell, they were partners in this project?

13 A. Correct.

14 Q. And you testified also that IBIS/LSi and Hodell on  
10:32:49 15 the other hand, they were in this development agreement  
16 that we're looking at, they were in this together.

17 A. Yes.

18 Q. Right? Because part of this contract was that  
19 Hodell was funding the development of In-Flight  
10:33:04 20 Enterprise. Right?

21 A. I'm not a lawyer. They prepaid and we used that  
22 money to fund the development. So I don't know legally  
23 if that answers your question.

24 Q. Fair enough. So they paid money --

10:33:23 25 A. They paid money for the licenses --

1 Q. Forgive me. Can I just take it a step at a time?

2 A. Um-hmm.

3 Q. Okay? They paid money, correct?

4 A. Correct.

10:33:31 5 Q. And you just testified they used that money to fund  
6 the development, right?

7 A. They paid money for licenses and we used our profit  
8 from that, yes.

9 Q. Let's take a look -- you know, I'm going to keep  
10:33:56 10 moving. Let's try it this way.

11 Take a look at Exhibit 9.

12 A. Okay.

13 Q. We've had this up a couple times also. This is the  
14 October 14th proposal?

10:34:12 15 A. I've seen it, yes.

16 Q. From IBIS?

17 A. Um-hmm.

18 Q. To Hodell. Take a look, please, at the second  
19 paragraph, the second sentence.

10:34:32 20 A. Okay.

21 Q. Can you blow that whole second paragraph up, Bob?

22 I'm sorry. The whole second paragraph, not  
23 just the items. That's better.

24 The second sentence of this document reads

10:34:50 25 "it should also be noted that as much as we are asking

1 you to participate in assisting in the funding of the  
2 development, the benefits are there."

3 You see that there, right?

4 A. I do.

10:35:00 5 Q. Would you agree with me now that they were  
6 assisting in the funding of the development?

7 A. Yes.

8 Q. Okay. Take a look at 740, please.

9 That one will need to be blown up. It is  
10:35:23 10 really faint on my screen.

11 I shouldn't have complained. Now it is  
12 gone.

13 740 -- is it on everyone else's screen?

14 Okay. Great.

10:35:35 15 This is a November 11th e-mail from Otto  
16 Reidl to you and Dale, right?

17 A. Correct.

18 Q. And Bill Rex and Kevin Reidl are copied. Right?

19 A. Correct.

10:35:48 20 Q. This is leading up -- this is prior to the  
21 execution of the development agreement. Right?

22 A. Um-hmm. Yes.

23 Q. Five, six weeks before that. Right?

24 A. Yes.

10:35:58 25 Q. And Mr. Reidl says to you in the second sentence,

1 "Although we are unhappy about playing a developer, open  
2 paren, pioneer, the guys with the arrows in their back,  
3 role, the attached agreement reflects what we are willing  
4 to proceed with," a page and it continues, correct?

10:36:22 5 A. Yes.

6 Q. And this likewise supports the testimony you just  
7 gave that one of the roles of Hodell in the development  
8 agreement was funding the development of In-Flight  
9 Enterprise.

10:36:32 10 A. Okay. Yes.

11 Q. Do you agree?

12 A. Yes.

13 Q. Thank you. So go back to the development  
14 agreement, please. 291.

10:36:44 15 Do you remember that the total price under  
16 the development agreement, after all the back and forth  
17 with Hodell and IBIS, was \$300,000?

18 A. Yes.

19 Q. And it was paid -- it was to be paid in five equal  
10:36:56 20 installments of \$60,000 each. Right?

21 A. Correct.

22 Q. Take a look at page two of the development  
23 agreement, please. It will come right up on your screen.

24 And by the way, if you want to work off of  
10:37:10 25 hard copies, I can get you one. I just?

1 It just seems easier --

2 A. This is fine.

3 Q. Okay.

4 A. As long as you zoom.

10:37:19 5 Q. That's the key, isn't it?

6 Take a look at page two, up top. The first  
7 three paragraphs there.

8 "In exchange for the appointment, The IBIS  
9 Group will, one, provide Hodell-Natco with the unlimited  
10:37:36 10 user licenses for In-Flight Enterprise and its  
11 integration into SAP Business One, and it goes on to  
12 describe how it is defined. For Hodell, for Hodell-Natco  
13 use at no charge." You see that there, right?

14 A. I do.

10:37:56 15 Q. So one of the things that Hodell would get in  
16 exchange for the \$300,000 that it was paying in the five  
17 equal installments of \$60,000 is this paragraph one here,  
18 right?

19 A. Yes.

10:38:06 20 Q. And this paragraph one here is unlimited In-Flight  
21 Enterprise licenses, no charge.

22 A. Correct.

23 Q. Go back to Exhibit 11 real quick, Bob.

24 We looked at this before, but I want to  
10:38:25 25 make sure the jury understands.



1                   The In-Flight Enterprise application and  
2                   the In-Flight Enterprise work that IBIS was going to do  
3                   for Hodell was a big undertaking with thousands of hours  
4                   of work. Correct?

10:38:39 5           A.       Correct.

6           Q.       So those In-Flight Enterprise licenses that Hodell  
7                   was going to get for free that we were just looking at,  
8                   they had a tremendous amount of value because of how much  
9                   work was going to go into creating In-Flight Enterprise  
10:38:55 10           in the first place. Right?

11           A.       Correct.

12           Q.       And if you look at Exhibit 11, right there the  
13                   middle of the page, the same thing we looked at before,  
14                   the middle of other people's pages, the same thing we  
10:39:06 15           looked at before, the estimate in October of 2014 from  
16                   IBIS for how long it would take them to develop the  
17                   In-Flight Enterprise application was 3816 hours.  
18                   Correct?

19           A.       Correct.

10:39:21 20           Q.       And then you can see over in the margin it is  
21                   indicated that there would be no charge?

22           A.       Correct.

23           Q.       Which is effectively what ended up happening?

24           A.       Correct.

10:39:29 25           Q.       So then go back to 291, please.

1 Second page, please.

2 And, Bob, can you blow up that same part we  
3 were looking at, the in exchange part?

4 There we go.

10:39:50 5 First three paragraphs.

6 We looked at number one. Number two is  
7 deliver the product in a timetable agreed upon. I want  
8 to focus on item three.

9 In the contract that IBIS and LSi signed  
10:40:06 10 with Hodell in exchange for that \$300,000 paid over those  
11 five equal \$60,000 installments, in addition to number  
12 one, in exchange, Hodell was getting number three.  
13 Correct?

14 A. Correct.

10:40:18 15 Q. So let's look at three. Upon successful completion  
16 of the development of In-Flight to SAP Business One, in  
17 consideration for assisting in the initial funding of  
18 In-Flight Enterprise development -- right?

19 A. Correct.

10:40:31 20 Q. Hodell-Natco will receive a \$100 per user license  
21 fee for the first one thousand users of In-Flight,  
22 excluding Hodell-Natco users. Right?

23 A. Correct.

24 Q. So, if the industry vertical is successful, and  
10:40:54 25 IBIS/Lsi are able to go out into the world and sell more

1 of these In-Flight Enterprise licenses, Hodell stands to  
2 make money as a result of that.

3 A. Correct.

4 Q. They stand to make up to a hundred thousand  
10:41:07 5 dollars?

6 A. Correct.

7 Q. So effectively, Hodell and LSi and IBIS, by way of  
8 the development agreement, they just went into business  
9 together?

10:41:18 10 MR. LAMBERT: Objection.

11 THE COURT: Overruled.

12 A. Correct.

13 Q. Let's review how that works, right?

14 Hodell is going to pay the \$300,000.

10:41:27 15 Right?

16 A. Correct.

17 Q. And IBIS/LSi is going to do all this work,  
18 including the estimated 3816 hours of work for the  
19 In-Flight Enterprise application, right?

10:41:38 20 A. Correct.

21 Q. And that would have obviously lots of value?

22 A. Correct.

23 Q. And Hodell would get all that value and only pay  
24 \$300,000 and might get a hundred thousand dollars later.

10:41:56 25 Correct?

1 A. Correct.

2 Q. All in exchange for Hodelle agreeing to be a  
3 pioneer.

4 A. Correct.

10:42:05 5 Q. Right? And just to be clear, go back to 11,  
6 please.

7 That 3816 hours, if you can highlight  
8 that --

9 A. Thank you.

10:42:27 10 Q. If you look down below the 3816 --

11 A. Correct.

12 Q. Do you see references to \$150 per hour?

13 A. Okay.

14 Q. That's a reference to IBIS/LSi labor rates. Right?

10:42:39 15 A. Correct.

16 Q. And you would agree with my math, if you applied  
17 those IBIS/LSi labor rates of \$150 to the 3816 estimated  
18 hours for the In-Flight Enterprise application, the kind  
19 of result of that math is \$572,000?

10:42:53 20 A. Okay. Right. I agree.

21 Q. Now, let's talk about some of what you covered  
22 yesterday, including the knowledge of SAP.

23 Let's take a look, Bob, please at Exhibit  
24 40.

10:43:20 25 This is an e-mail. Can you blow up the top

1 of it, please?

2 This is an e-mail from you to Dan Kraus,  
3 dated November 3, 2004. Right?

4 A. Correct.

10:43:41 5 Q. And you agreed yesterday that this would have been  
6 the first notice to SAP of the Hodell name.

7 A. Yes.

8 Q. Okay? Go to the second page, which is the  
9 attachment.

10:43:57 10 If you look at Line 13 -- thank you.

11 It says, "customer prepays 60 percent to  
12 IBIS/LSi for fastener development." Right?

13 A. Correct.

14 Q. And then look down at 16. Can you highlight that  
10:44:20 15 please?

16 It says LSi/IBIS would acquire the licenses  
17 in the fourth quarter of 2005. Correct?

18 A. Correct.

19 Q. So you would agree with me that leading up to the  
10:44:38 20 development agreement, it was contemplated that the  
21 licenses that Hodell would eventually have with SAP, that  
22 wasn't going to happen until the end of the quarter in  
23 2005.

24 A. I didn't get the question.

10:44:53 25 Q. Okay. You would agree with me -- let's unpack it.

1                   Hodell, if it wanted to be a customer that  
2                   used B1, would have to execute a license agreement with  
3                   SAP?

4                   A.     Correct.

10:45:09 5                   Q.     And you would agree with me that as of November 3,  
6                   2004, when this document was created, it was estimated  
7                   that that license agreement between Hodell on the one  
8                   hand and SAP on the other hand, that wouldn't happen  
9                   until the end of the quarter, 2005.

10:45:26 10                  A.     Okay.   Correct.

11                  Q.     So let's -- and that's when it actually happened.  
12                  Correct?

13                  A.     I believe so.

14                  Q.     Well, let's take a look at 316.

10:45:44 15                         Let's unpack it this way. Let's look at  
16                         291 first.

17                         Back to the development agreement. Go to  
18                         paragraph three. You can see there, again, this is the  
19                         contract between IBIS and LSi and Hodell. Right?

10:46:14 20                  A.     Correct.

21                  Q.     This was executed in December, 2004. Right?

22                  A.     Correct.

23                  Q.     Okay. And here in Paragraph 3 they are talking  
24                         about Hodell paying some of the sixty thousand dollar  
10:46:26 25                         installment payments, right?

1 A. Correct.

2 Q. Let's read the whole thing. "Hodell-Natco will pay  
3 \$60,000 of the purchase price of 120" -- and that's part  
4 of the 320, right?

10:46:37 5 A. Correct.

6 Q. "When IBIS orders the software from SAP." You see  
7 that there, right?

8 A. Correct.

9 Q. So it was clear that IBIS had not ordered the  
10:46:44 10 software yet from SAP?

11 A. Correct.

12 Q. Okay. And then it continues, "this should occur on  
13 the date mutually agreed upon and listed in the In-Flight  
14 Enterprise development project plan, which is attached."  
10:46:56 15 Right?

16 A. Okay.

17 Q. So now go to 319.

18 Or is it 316? 316. And there you have it,  
19 right? In December of 2005, that's when Hodell executed  
10:47:16 20 a license agreement with SAP.

21 A. Correct.

22 Q. And that's when they got their licenses.

23 A. Correct.

24 Q. Thank you. You said yesterday, I'm switching  
10:47:31 25 gears --

1 A. What did I just say yes to? They had the license  
2 agreement.

3 Q. You can put it back up. I want to make sure he is  
4 comfortable.

10:47:39 5 I'm just pointing out that the license  
6 agreement, it is dated December, 2005?

7 A. 2005, correct.

8 Q. December, 2005?

9 A. Correct.

10:47:46 10 Q. Which is what was contemplated in Exhibit 40 on the  
11 second page, and it says the licenses will be fourth  
12 quarter 2005. Right?

13 A. Correct.

14 Q. And this is the actual agreement, December, 2005,  
10:48:01 15 is the fourth quarter of 2005, correct?

16 A. Yes.

17 Q. And this is dated the 23rd of December, 2005,  
18 correct?

19 A. Correct.

10:48:08 20 Q. And again, that's when Hodell got their licenses  
21 from SAP?

22 A. You mean physical delivery of them?

23 Q. They acquired their license rights?

24 A. They acquired their license rights.

10:48:19 25 Q. Correct?



1 I just want to pick up the answer so the  
2 court reporter hears it.

3 A. Yes.

4 Q. Now we'll switch gears.

10:48:30 5 You said yesterday that you're not sure you  
6 told anyone at Hodell that B1 could support up to 500  
7 users. You weren't sure.

8 A. Okay.

9 Q. Correct? And you realize not only are you not sure  
10:48:47 10 of whether you ever said it, but you can't point to any  
11 documents anywhere suggesting that anyone ever told  
12 Hodell that B1 was good for up to 500 users.

13 A. You mean other than the SAP marketing material?

14 Q. Well, let's be clear. Let me ask it to you this  
10:49:16 15 way.

16 I don't want to limit it to anything.  
17 You're not aware of any document in the universe that  
18 stated to Hodell or to anyone that B1 was good for up to  
19 500 users.

10:49:34 20 A. Again, I -- I don't know how to answer that.

21 Q. Maybe with a yes or no question. You're not aware  
22 of any -- a yes or no answer -- you're not aware of any  
23 document in the universe that ever informed Hodell or  
24 anyone else that B1 was good for up to 500 users?

10:49:56 25 A. My confusion is did I give them those documents or

1 did they see them? I know they saw them because they  
2 produced them.

3 Q. Let me try and approach this in a different way. I  
4 know you have 43 years of sales experience, right?

10:50:09 5 A. I have what?

6 Q. You have 43 years of computer software sales  
7 experience.

8 A. Maybe 44 by now.

9 Q. Right. And you -- we're all aging.

10:50:23 10 And LSi had a distribution agreement and an  
11 SDK, right?

12 A. Correct.

13 Q. And you were involved in the same of B1 not just to  
14 Hodell but to other customers, you had some understanding  
10:50:33 15 of B1, correct?

16 A. Correct.

17 Q. And you're not aware of any document in the  
18 universe that told Hodell or anyone else that B1 was good  
19 for up to 500 users?

10:50:48 20 MR. LAMBERT: I'm going to object, Your  
21 Honor.

22 BY MR. MILLER:

23 Q. Can you answer that with a yes or no? Is that  
24 possible? Are you aware of a document of that type in  
10:50:58 25 the universe? Yes or no?

1 A. By answering that, I would be saying that my people  
2 didn't send them stuff.

3 Q. I'm just asking what -- what you're aware of, sir.  
4 Are you aware of any document in the universe that  
10:51:12 5 informed Hodell or anyone else that B1 was good for up to  
6 500 users. Yes or no?

7 A. The SAP -- yes.

8 Q. What document?

9 A. The SAP marketing brochures.

10:51:22 10 Q. And when you reference the SAP marketing brochures,  
11 you reference them because they reference employees.  
12 Correct?

13 A. Yes.

14 Q. You're aware that there is no SAP marketing  
10:51:32 15 literature that says B1 is good for Hodell or good for  
16 anyone else for up to 500 users. Correct?

17 A. It said employees.

18 Q. Right. And you draw -- you treat employees  
19 exactly like users?

10:51:47 20 A. I do.

21 Q. But, just to be clear, so the jury understands,  
22 you're not aware of any SAP marketing literature that  
23 says B1 is good for up to 500 users there. There is no  
24 such thing, right?

10:52:00 25 A. As far as I know.

1 Q. And you're not aware of any document in the  
2 universe that says B1 is good for 500 users?

3 A. Users, no.

4 Q. But, you're aware of literature that says it is  
10:52:13 5 good for 500 employees?

6 A. Yes.

7 Q. And the same is true, for the whole range from 300  
8 to 500. We don't have to go through this thing again, do  
9 we? There wouldn't be documents that you're aware of  
10:52:26 10 that said B1 is good for 300 to 500 users, correct?

11 A. Correct.

12 Q. Just some marketing literature that refers to  
13 employees, correct?

14 A. Correct.

10:52:33 15 Q. Okay. B1 is ERP software, right?

16 A. Yes.

17 Q. We covered that. Not all employees are users of  
18 ERP software. Correct?

19 A. Correct.

10:52:57 20 Q. Because as you explained to the jury earlier today,  
21 ERP software for the most part is an accounting program  
22 and serves back office functions. Right?

23 A. Accounting, inventory, foreclosing, sales analysis,  
24 receivables, payables. It runs the company.

10:53:21 25 Q. And the reality, though, is that typically with an

1 ERP software product like B1, not all of the company's  
2 employees are users of that ERP software. Correct?

3 A. Substantially they are. Does the janitor have a  
4 user, no. But does every other office administrator have  
10:53:47 5 them? Sure.

6 Q. Office administrators are users, right?

7 A. Sure.

8 Q. But you're aware that employees, just because a  
9 person is an employee of a company that happens to have  
10:53:56 10 an ERP software product, that doesn't mean that they are  
11 a user of that ERP software product?

12 A. Does not mean, no.

13 Q. Thank you. Let's talk about the project, okay?

14 The project started right after the  
10:54:15 15 development agreement was signed in December of 2004,  
16 right?

17 A. Correct.

18 Q. And your team worked on that project all the way up  
19 to when the license agreement was signed in December of  
10:54:27 20 2005, but then even after that, all the way up to go-live  
21 and even after that in 2007. Right?

22 A. Correct.

23 Q. Let's take a look at Exhibit 139. Can you go, Bob,  
24 to the bottom -- really, go to the bottom of the second  
10:54:53 25 page is probably the place to start.

1 Can you blow that up? Oh, boy. You can  
2 see at the bottom an e-mail from you to Dale Van Leeuwen  
3 and Jon Woodrum. Do you see that there?

4 A. I see one from Dale to me.

10:55:19 5 Q. No, no. All the way at the bottom.

6 A. I'm sorry, I'm sorry. Yes. Correct.

7 Q. If we need to get the exhibit out, we will.

8 A. You're correct. I was misreading.

9 Q. The one we are looking at hat's on the screen is  
10:55:34 10 from you to Dale Van Leeuwen and Jon Woodrum, who is also  
11 at LSi, correct?

12 A. Correct.

13 Q. And it is dated May 10, 2005. Right?

14 A. Correct.

10:55:42 15 Q. And May 10, 2005, would have been during the heart  
16 of this project, right? You guys had been working on it  
17 since December, 2004. You are five months into the  
18 project, right?

19 A. We were five months into the project.

10:55:56 20 Q. Okay. And down at the bottom, you're writing to  
21 your two people, Dale and Jon, thinking through how I  
22 approach Otto for the second payment, optimally, I think  
23 we should -- and can you go to the next page, Bob?

24 And if you would blow that up, "prepare a  
10:56:22 25 document that he signs? Leaving it open-ended would seem

1 to expose us and not protect us. What are your thoughts  
2 on this? Dan." Right.

3 A. That's what it says.

4 Q. When you talk about that second payment, just so  
10:56:35 5 everybody is following, it is the second \$60,000 payment  
6 towards the \$300,000 that Hodell was going to owe under  
7 the development agreement. Right?

8 A. Correct.

9 Q. Okay. So look next at the first page, all the way  
10:56:55 10 at the top. And about midway down, you can see a  
11 response from Jon Woodrum?

12 A. Okay.

13 Q. And just to place this into time, you're five  
14 months into the project, right? Again?

10:57:12 15 A. Correct.

16 Q. But, you're still seven months away from Hodell  
17 executing the license agreement with SAP, right? That  
18 didn't happen until December, 2005. Right?

19 A. Correct.

10:57:21 20 Q. Okay. And then what you have here in the upper  
21 left-hand corner is Jon Woodrum responding to you.  
22 Right?

23 A. Correct.

24 Q. Okay. Now, I don't know if you can see this, and  
10:57:34 25 you tell me if you need to see more, but when Jon Woodrum

1 responds, he doesn't copy Dale?

2 A. Okay. That's correct.

3 Q. That's correct? You're aware of it. It is kind of  
4 hard with the screen, I want to make sure you're  
10:57:48 5 comfortable and understand that when Jon Woodrum  
6 responds, Dale is not copied, right?

7 A. It appears not.

8 Q. And Jon Woodrum, he was the vice president of  
9 software support at IBIS/LSi, right?

10:58:02 10 A. Correct.

11 Q. In fact, I think if you go -- well, let's just  
12 keep moving. Go to the next page.

13 End of the first full paragraph.

14 It starts with, "somehow."

10:58:18 15 Just to place this in context, you asked  
16 Jon and Dale, "hey, I think I'm approaching Otto for the  
17 second \$60,000 payment, what do you guys, think," right?  
18 That's what you had asked?

19 A. That's correct.

10:58:33 20 Q. Here is Jon responding to you, not copying Dale,  
21 right? Here is what he says. Look at the second to the  
22 last sentence of the paragraph that begins with the word  
23 "somehow." I will not go through the whole e-mail. We  
24 can if you would like. I want to focus on a couple of  
10:58:47 25 sentences and I want to start with this one "we have been



1 unrealistic thinking Dale could have this ready in the  
2 timeline originally envisioned." Do you see that there?

3 A. Yes.

10:59:05

4 Q. Can you highlight the whole sentence so Mr. Lowery  
5 can see that?

6 A. I can see that.

10:59:18

7 Q. This is Mr. Woodrum reporting to you, blind to  
8 Dale, that IBIS/LSi is unrealistic thinking that Dale  
9 could have it ready in the timeline originally  
10 envisioned, correct?

11 A. Yes.

12 Q. He is talking about the Hodell project, right?

13 A. Yes.

10:59:27

14 Q. And then go to the paragraph down below that starts  
15 with "I'm serious." He reports to you "I'm serious when  
16 I say that HN" -- that is Hodell-Natco, right?

17 A. HN is Hodell-Natco, correct.

10:59:44

18 Q. I'm serious when I say if Hodell's enhancements are  
19 somewhat described in the list of IBIS solutions. We are  
20 looking at 10,000 hours and five years, not 2800 hours  
21 this year. That's what he reported to you, correct?

22 A. That is what?

23 Q. That is what he reported to you, correct?

24 A. That's correct.

10:59:54

25 Q. And then if you look down further, right at the

1 lower left-hand corner, first sentence of the last  
2 paragraph on the page, "I would not sign off without  
3 specs if I were Hodell." Correct?

4 A. Correct.

11:00:08 5 Q. Can you scroll down a little more, because I want  
6 to make sure we're clear on this? And show Mr. Woodrum's  
7 signature line.

8 Right there. Vice president of software  
9 support. Okay.

11:00:24 10 So now let's look at Exhibit 41. Exhibit  
11 41 is another letter on IBIS letterhead. Right?

12 A. Correct.

13 Q. Okay. And if you go to the end of it -- well,  
14 actually, let's cover the date first. This is May 17,  
11:00:57 15 2005. Right?

16 A. Correct.

17 Q. And just to be clear, the one we were just looking  
18 at started out as a May 10, 2005 e-mail and then Mr.  
19 Woodrum got back to you on the 11th. Right?

11:01:13 20 A. Correct.

21 Q. So there was May 10th, you are asking Dale and Jon  
22 about payment. May 11th. Jon gets back to you with what  
23 we just covered, right?

24 A. Correct.

11:01:23 25 Q. And here you are, May 17, writing to Hodell.

1 Right?

2 A. I can't read it.

3 Q. That's fine. Let's go -- that helps. Thank you.

4 This is IBIS letterhead. Right?

11:01:34 5 A. IBIS letterhead, May 17, 2005. Dear Otto.

6 Correct.

7 Q. And go to the end, please.

8 It is only two pages. I just want Mr.

9 Lowery to understand.

11:01:46 10 And this came from you, correct?

11 A. Correct.

12 Q. Okay. And let's go back to the first page, please?

13 Go to the second paragraph.

14 So after that exchange, where you ask Dale

11:02:02 15 and Jon what to do and Jon told you the things we just

16 reviewed, you report to Mr. Reidl at Hodel, "as a result

17 of our last meeting and progress review, I hope you feel

18 as I do that we demonstrated a thorough execution of our

19 game plan and a dedication to the project that shows us

11:02:22 20 to be on target to our projections."

21 That's what you reported to Mr. Reidl?

22 A. Correct.

23 Q. Can you go down, please, to the last paragraph of

24 this page?

11:02:37 25 And you continued, reporting to Mr. Reidl,

1 "as the programers work through the development effort  
2 and we see the strength of the tools that will be made  
3 available to Hodell through this effort, we've become  
4 even more excited over the solution." Correct?

11:02:57 5 A. Correct.

6 Q. And again, this is five months into the work you  
7 were doing under the development agreement, but seven  
8 months before Hodell executed the license agreement with  
9 SAP. Correct?

11:03:06 10 A. Correct.

11 Q. Let's look at Exhibit -- excuse me. Oh, it's  
12 clear. Mr. Reidl paid the \$60,000 after he got that,  
13 right?

14 A. He did.

11:03:34 15 Q. So we don't have to go through that?

16 A. He paid the second payment.

17 Q. Let's keep moving. Look at 215, please. And by  
18 the way, speaking of being on schedule, go-live was late  
19 on this project, right?

11:04:02 20 A. Say that one more time.

21 Q. I say, by the way, speaking of schedule, the  
22 go-live on this project was later than it had originally  
23 anticipated to be.

24 A. You mean at this point in time?

11:04:14 25 Q. Well, at some point -- say for example at the time

1 of this exchange with Mr. Reidl, you would agree that  
2 go-live was currently then scheduled for somewhere  
3 midpoint 2006. Right?

4 A. I mean, I don't have any paperwork in front of me,  
11:04:32 5 but I believe the original go-live was December, '06.  
6 December of '06. Then it slipped to January and then to  
7 March 07. As I testified earlier today in testimony,  
8 that was the memory freezes. December 15, '06 was the  
9 original go-live as I understand it. My notes.

11:05:00 10 Q. There is no pending questions. You have notes?

11 A. That I made last night. Yeah.

12 Q. Thank you.

13 A. You can have a copy if you want.

14 Q. I may ask you for one when we are on break. Thank  
11:05:14 15 you.

16 A. Okay.

17 Q. But I think it is probably better that you just  
18 testify from your recollection. Is that fair?

19 A. That's fine.

11:05:19 20 Q. And if you can't remember, just let us know?

21 A. I will.

22 Q. And if you need to look at the notes, then we'll  
23 deal with that. Okay?

24 A. Okay.

11:05:30 25 Q. Fair enough?

1 A. Fair enough.

2 Q. And we were just talking about when was the go-live  
3 date originally supposed to be, right?

4 A. Correct.

11:05:38 5 Q. Just give me a moment, please.

6 Can you go to page 604, please, of your  
7 deposition?

8 A. Page 604?

9 Q. Correct.

11:06:06 10 A. Okay.

11 Q. Now, we talked a little bit about this deposition,  
12 and you remembering it, and it going on over four  
13 sessions. Right?

14 A. The what was?

11:06:18 15 Q. This deposition went on for a long time?

16 A. Yes.

17 Q. It was in four separate sessions, right?

18 A. Yes.

19 Q. This deposition was also years ago. Right?

11:06:27 20 A. It was.

21 Q. I think the date of the first of the sessions was  
22 in February of 2012 and then the second of the sessions  
23 was in July of 2012. Right?

24 A. I'll take your word for it.

11:06:40 25 Q. Okay. Well, you would also agree that 2012 is a

1 lot closer in time to the facts of this case than today,  
2 June of 2015. Right?

3 A. Yes.

4 Q. And you were having some trouble remembering when  
11:06:54 5 was the original go-live on this project. Right? Just a  
6 minute ago you were having trouble remembering that,  
7 right?

8 A. Correct.

9 Q. Okay. So if you look at Page 604, you would agree  
11:07:07 10 that on Line 7, Mr. Star asked you, "When you signed the  
11 development agreement with, between LSi and Hodell, when  
12 did you expect, at that point in time, when did you  
13 expect to go live on the --

14 "Answer: '06 sometime."

11:07:22 15 End of the question. "Full system."

16 And there is some back and forth but then  
17 you answer, on Page 604, line 18, "I'm sorry, sometime in  
18 2006 I think, I believe it was June of 2006.

19 "Question: June, 2006?

11:07:40 20 "Answer: Was the first one?

21 "Question: But you didn't actually go live  
22 until March, '07, correct?

23 Answer: March, 07."

24 Do you see that there?

11:07:50 25 A. Yes.

1 Q. Does that accurately reflect your testimony?

2 A. Yes.

3 Q. And that was three years ago, right?

4 A. Yes.

11:07:56 5 Q. Will you agree that the go-live was originally  
6 supposed to be June of 2006, but it ended up not  
7 happening until March of 2007?

8 A. I don't know. These conflict.

9 Q. Okay. Take a look, please, at Exhibit 215.

11:08:17 10 A. Again -- oh.

11 Q. Actually -- yeah. Take a look at Exhibit 215.

12 A. Okay.

13 MR. MILLER: Your Honor, Exhibit 215 is  
14 almost exactly the same as Exhibit 120. Exhibit 215 was  
11:08:42 15 originally, as I understand it, a Hodell exhibit, but it  
16 was withdrawn. And the first page that is off of 215 and  
17 is not on 120 is the cover e-mail, and I don't think  
18 we'll have an objection, I would like to walk the witness  
19 through Exhibit 120. It is just going to be cleaner and  
11:09:02 20 easier than going back to his deposition. I just want to  
21 make sure no one has objections.

22 THE COURT: Go ahead.

23 BY MR. MILLER:

24 Q. Take a look at Exhibit 215. You can see this is an  
11:09:12 25 e-mail -- this is tough to read -- but the sender is



1 Jon Woodrum again, right? Can you see that on the second  
2 line?

3 A. Yes.

4 Q. Can you highlight that, Bob, please?

11:09:23 5 Can you read that?

6 A. Can I read it? Yes, I can.

7 Q. There we go. The sender was Jon Woodrum and the  
8 recipient was basically you, Dan Lowery, right?

9 A. That's correct.

11:09:42 10 Q. And you can see the date of it was March 24, '05.

11 A. Correct.

12 Q. Right? And again, Jon Woodrum is the vice  
13 president of software support. Right?

14 A. Correct.

11:10:00 15 Q. And he is basically writing a report for you about  
16 the Hodell project later in May, 2005. This is really  
17 only a couple days after your prior exchange, right?

18 A. Okay.

19 Q. And this is seven months before the December 2005  
11:10:17 20 Hodell SAP license agreement?

21 A. Correct.

22 Q. This document that is attached, this report -- can  
23 you go to that, Bob?

24 It is pretty dense. More dense even than  
11:10:29 25 the e-mail exchanges from before.

1 Can you go to the next page, please?

2 I've got it in my hand here. It is one,  
3 two, three, four, five single space pages, and I'm not  
4 going to go through it all. You can see Mr. Woodrum  
11:10:56 5 starts with background, he talks about the project and he  
6 talks about his experience. I want to go to Roman III,  
7 which is on the fourth page of the exhibit, fifth  
8 paragraph down. Stop. Thank you.

9 Right there. The paragraph that starts  
11:11:21 10 with "my concern." Oh, wait. No. The second full  
11 paragraph from the top. "My concern."

12 Mr. Woodrum reports to you, on May 21,  
13 2005, "My concern for the project, regardless of  
14 scheduling timeline, is that we do not have an agreed  
11:11:41 15 upon scope definitive enough to commit to the timeline  
16 agreed upon, open paren, as originally intended with  
17 project item number one." Do you see that there?

18 A. Yes.

19 Q. And you actually recall having that exchange with  
11:12:00 20 Mr. Woodrum, correct?

21 A. Yes.

22 Q. This exchange, where Mr. Woodrum e-mailed you on  
23 May 24, 2005 --

24 A. Yes.

11:12:07 25 Q. -- and attached this five-page single space report,

1 you remember that, don't you?

2 A. Yes, I do.

3 Q. And none of these concerns that Mr. Woodrum is  
4 expressing here and elsewhere in this report were passed  
11:12:22 5 along to Hodell, right?

6 A. Say that again.

7 Q. Sure. Mr. Woodrum is writing to you, right?

8 A. Correct.

9 Q. Five months into the project and seven months  
11:12:31 10 before the license agreement. Right?

11 A. Correct.

12 Q. And one of the things he is telling you is about  
13 this concern that is up on the screen. Right?

14 A. Correct.

11:12:40 15 Q. And then let's look at some more. Go to the next  
16 page where it says recommendation.

17 Under paragraph 3, scroll down, right  
18 there. The paragraph, in my opinion, can you highlight  
19 that? He is also reporting to you, "in my opinion, I  
11:13:09 20 feel we need to tell the customer that we think it is not  
21 possible that we are setting the 2005 project  
22 expectations too high. This concern makes it more  
23 important than before to clarify the project  
24 functionality scope as originally planned. We should  
11:13:25 25 take the lead in doing the right thing."

1                   That is another thing that Mr. Woodrum  
2                   reported to you, correct?

3           A.       Yes.

4           Q.       So kind of back to my original question. You  
11:13:34 5           didn't report Mr. Woodrum's concerns and recommendations  
6           to Hodell.

7           A.       We did not report this to Hodell?

8           Q.       I'm asking you if it is true that you did not pass  
9           this along to Hodell.

11:13:46 10          A.       Well, that takes some thinking here.

11                   What Jon was asking for is where are the  
12                   detailed design specs. Dale was supposed to deliver  
13                   those, and I don't know exact dates here, but Dale in '05  
14                   somewhere was battling stage five lymphoma cancer. We  
11:14:11 15           were trying to work around Dale's, the limitations that  
16           that does.

17          Q.       Sir, it is a simple question.

18          A.       I know, I'm thinking out loud. I'm sorry, I have  
19           to recollect here.

11:14:28 20                   These concerns for detailed design specs by  
21                   Jon, because Jon was not the project manager of the  
22                   Hodell product --

23          Q.       Sir, you're going to have a chance to testify later  
24           if Hodell wants to ask you questions.

11:14:45 25                   My question is were the concerns and

1 recommendations in this report and in particular the ones  
2 I just reviewed passed along by IBIS/LSi to Hodell?

3 A. In a way.

4 Q. Take a look at your deposition again, okay?

11:14:59 5 A. Let me just finish.

6 Q. Sir, thank you for your answer. Let's look at your  
7 deposition. Page 452, please.

8 A. Oh, I'm sorry. What page?

9 Q. Page 452. At the top, do you see that there? Line  
11:15:38 10 2.

11 "Question: Referencing this report. Okay.  
12 Were any of the concerns expressed by Mr. Woodrum in this  
13 project status update passed along to Hodell to your  
14 knowledge?

11:15:48 15 "Answer: This is your answer. You're  
16 asking me if Jon's, if the internal concerns between Jon  
17 and Dale were passed on to Hodell?

18 "Question: Correct.

19 "Answer: No. Why would they be?"

11:16:03 20 That was your testimony, correct?

21 A. I'm still catching up. We're not on 452.

22 Q. Let's slow down. I am on Page 452. In the upper  
23 right-hand corner.

24 A. Upper right? Okay. Passed along to Hodell.

11:16:18 25 Q. And you would agree, sir, that your testimony

1       referencing this report --

2       A.     Right.

3       Q.     Were any of the concerns expressed by Mr. Woodrum  
4       in this project status update including the one we just  
11:16:31 5       reviewed passed along to Hodell to your knowledge.

6                "Answer:  You're asking me if Jon's, if the  
7       internal concerns between Jon and Dale were passed on to  
8       Jon and Hodell:

9                "Question:  Correct.

11:16:42 10               "Answer:  No, why would they be?"

11               That is your testimony, right?

12       A.     That is my testimony.

13       Q.     Let's take a look at Exhibit 128, please.

14       A.     Okay.

11:16:50 15       Q.     Here is another report from Jon Woodrum to you.

16       This one is dated later, August 1, 2005.  Can you go to  
17       the first page, please, the first kind of substantive  
18       page?

19               You agree -- I have that part, right?

11:17:36 20       Right?

21       A.     That what?

22       Q.     That this is a report from Jon Woodrum to you dated  
23       August 1, 2005.  We don't have to go through those  
24       details.

11:17:45 25       A.     Yes.

1 Q. Look at the end of the third paragraph, please.

2 A. Okay.

3 Q. I'm going to read -- I guess I will read the whole  
4 paragraph.

11:17:59 5 "Monday evening, 6:30 p.m. hours, before  
6 you, Dale, and I are able to meet with one of our largest  
7 prospects in a two day presentation, Dale sends me an  
8 e-mail to let me know that he thinks I'm a back stabber,  
9 I'm a liar, I am not to assume he is my friend and we  
11:18:15 10 should not expect that he will be staying with the  
11 company a day beyond his May, 2006 commitment to you."

12 Do you see that there?

13 A. I do.

14 Q. Okay. LSi acquired IBIS in April or May of 2004.  
11:18:31 15 Correct?

16 A. Correct.

17 Q. And Dale had an employment agreement in connection  
18 with that acquisition. Right?

19 A. Correct.

11:18:37 20 Q. And the deal was, Dale, you have to stay here at  
21 least two years. Correct?

22 A. Correct.

23 Q. So when Jon reports to you on August 1st that Dale  
24 won't be staying with the company a day beyond his May,  
11:18:50 25 2006 commitment to you, that is a reference to Dale's

1 employment agreement. Right?

2 A. Correct.

3 Q. And the idea is the first date Dale can walk, he is  
4 going to take off. Right?

11:19:01 5 A. That's what he is saying.

6 Q. And again, this is eight months into the  
7 development agreement project that IBIS/LSi had with  
8 Hodell. Right?

9 A. Correct.

11:19:10 10 Q. And four months before Hodell had a license  
11 agreement with SAP.

12 A. Correct.

13 Q. Okay? Take a look, please. You didn't tell Hodell  
14 when you got this report that there was a chance that  
11:19:41 15 Dale was going to leave soon, did you?

16 A. I don't know.

17 Q. Take a look at Exhibit 844, please.

18 Would you agree that you waited eight  
19 months, until March of 2006, so from August of 2005, you  
11:20:06 20 waited eight months, until March of 2006 to tell Hodell  
21 that Dale might be leaving?

22 A. Is that what this e-mail is? Can I read it?

23 Q. It's fine. Let's look at 844.

24 The way to look at 844 would be to start at  
11:20:31 25 the bottom, okay.



1 So can you, Bob, go to the second page?

2 A. Okay. What is the question?

3 Q. There is no pending question yet. I'm going to  
4 orient you on the document and then we'll walk it through  
11:20:47 5 because we're trying to figure out when did you tell  
6 Hodell what you knew in August of 2005 about Dale  
7 leaving. Okay? Fair enough?

8 A. Fair enough.

9 Q. Okay. So we go to the second page. That's the  
11:21:06 10 first page, I think. We're looking at 844, right? Okay.  
11 Something is not right.

12 Okay. There we go. Thank you. The screen  
13 looked so clear, I thought it must be a different  
14 document.

11:21:24 15 The date of this -- I'm going to highlight  
16 the date, Bob, please, and the "to" and "from." You have  
17 Kevin Reidl, who is here in the courtroom and testified  
18 the other day, right --

19 A. Okay.

11:21:39 20 Q. He is writing to you, you can see that in the upper  
21 right-hand corner there, Dan Lowery, right?

22 A. Yes.

23 Q. And he copies his father, Otto, right? And then  
24 let's go to the text, just the first paragraph. You can  
11:21:55 25 emphasize that, please, the text.

1 "Good morning, Dan. I was recently made  
2 aware of Dale's decision to leave IBIS. This comes as a  
3 shock as we move towards the biggest transition in our  
4 company's history. As you know, having Dale involved in  
5 the SAP project was a major deciding factor for us."

11:22:10

6 Correct?

7 A. Correct.

8 Q. So here you have Kevin writing to you in March of  
9 2006 about him learning from somebody else that Dale is  
10 leaving the project. Right?

11:22:24

11 A. Yes.

12 Q. So would you --

13 A. I don't know, I don't know who he is referencing.

14 Q. Well, clearly he is writing to you --

11:22:38

15 A. Right.

16 Q. In March of 2006, indicating that he just found out  
17 Dale is leaving, right?

18 A. Okay.

19 Q. So that must mean you didn't tell him between

11:22:48

20 August of 2005 and when he wrote to you in March of 2006,  
21 right?

22 A. I didn't tell Kevin, obviously.

23 Q. You're not aware of telling anyone else at Hodell  
24 that news, are you?

11:22:58

25 A. I have -- I have no idea. I can't recollect.

1 Q. So let's look at your response, and that's the  
2 front of the document.

3 This is you responding to Kevin, March 17,  
4 11:26 a.m., correct?

11:23:26 5 A. Right.

6 Q. So basically --

7 A. The day after his e-mail.

8 Q. It is actually the same day. He wrote to you on  
9 March 17th at 8:42 a.m. --

11:23:36 10 And you are writing back three hours later.

11 Kevin and Otto, first, I know we've not had  
12 the length of experience that you have had with Dale, but  
13 I hope I have shown you the openness and honesty I try  
14 and run my business on."

11:23:50 15 And you continue. "When I first heard Dale  
16 was leaving two weeks ago, it was a surprise, but not  
17 totally unexpected. A month ago, he mentioned to me he  
18 purchased seven commercial real estate buildings and my  
19 brain immediately thought of the complexity and time  
11:24:09 20 commitment that it takes. I then started the plan for  
21 the eventual notification of his leaving. Two weeks ago  
22 he informed me May 18th would be his last day."

23 You see that there, right?

24 A. Yes.

11:24:20 25 Q. Okay. So even to this day, in March of 2006, March

1 17, when you provided an explanation to Kevin and Otto,  
2 you are still not telling them what Jon Woodrum told you  
3 back in August of 2005, right?

4 A. There is no need.

11:24:36 5 Q. You have a different story --

6 A. Well, it was an internal document from Woodrum.

7 Q. Right. So there is an internal document from  
8 Woodrum, correct?

9 A. Yes.

11:24:44 10 Q. And that is not a falsified document. He reported  
11 those things to you, correct?

12 A. Correct.

13 Q. And in this report, when Kevin asks you, hey, what  
14 is going on, I heard Dale is leaving, you have this  
11:24:57 15 explanation in the second paragraph. But that

16 explanation still doesn't include what you heard from  
17 Jon. Correct?

18 A. Let me read the e-mail here.

19 Can you scroll down a little bit?

11:25:25 20 Q. Sure. Maybe we should give the witness a hard  
21 copy. It is 844.

22 A. Can I just scroll down?

23 We're notifying him, we're agreeing with  
24 him, Dale's leaving, putting together the conversion  
11:26:17 25 plan, the transition plan. Dale is available to be a

1 consultant." What's the question?

2 Q. What you told Kevin and Otto in March of 2006 was  
3 different from what Jon Woodrum told you back in August  
4 of 2005. Correct?

11:26:31 5 A. Yes.

6 Q. Thank you.

7 A. I don't understand. I mean --

8 Q. That's fine.

9 A. -- what that means. What Jon is saying was his  
11:26:40 10 concern. Jon was not in charge of the product. Dale  
11 was. And it was a complicated personnel mess for me to  
12 deal with but we made plans to get Jon involved and take  
13 over the project when Dale was leaving.

14 Q. I don't want to go back and forth all day, but you  
11:26:55 15 never reported what Jon reported to you, you reported  
16 this version in paragraph two. Correct? That's the one  
17 you reported?

18 A. Because Jon was expressing thoughts --

19 Q. Jon, just to be clear, paragraph two, you didn't  
11:27:12 20 even report you knew in August of 2005 that Dale might be  
21 leaving. Correct? Correct?

22 A. He was expressing concerns about we don't have  
23 detailed design specs. Because of his note we got the  
24 detailed design specs.

11:27:27 25 Q. One of the concerns that Jon had was that Dale

1 might leave. Correct?

2 A. Correct.

3 Q. And you didn't report either then or at any time up  
4 to and including this e-mail that Jon expressed a concern  
11:27:41 5 in August of 2005 that Dale might leave?

6 A. Dale had not told me he was leaving. Why would I  
7 believe Jon?

8 Q. And instead, what you reported, among other things,  
9 to Kevin and Otto, was that you first heard Dale was  
11:27:56 10 leaving two weeks ago, correct?

11 A. Okay.

12 Q. Okay. And Dale did leave?

13 A. Dale did leave.

14 Q. On March 18, 2006?

11:28:02 15 A. April 28th.

16 Q. Excuse me.

17 A. April 28th.

18 Q. I used the wrong date. I have May 18, 2006. Could  
19 it have been that?

11:28:11 20 A. April 28th was the last day. That's the  
21 acquisition of the company date.

22 Q. That's the point, he left the first day he could?

23 A. Yes.

24 Q. Okay. You are in litigation with Dale, correct?

11:28:34 25 A. Correct.

1 Q. Dale accused you of fraudulently using LSi money  
2 for your own personal use?

3 MR. LAMBERT: Objection.

4 THE COURT: Objection sustained.

11:28:45 5 A. You guys are lawyers. You know you can't talk  
6 about litigation.

7 MR. MILLER: Your Honor, move to strike.

8 There is a whole line of questioning we can get into if  
9 the witness would like.

11:28:56 10 THE COURT: No, no. That is not necessary.

11 MR. MILLER: Thank you. I'll move on.

12 BY MR. MILLER:

13 Q. Let's look at Exhibit 142. Go all the way to the  
14 bottom, please.

11:29:29 15 Second page, actually, is probably the best  
16 way to do it.

17 Can you scroll up, Bob, so we can see who  
18 it is from? Right there.

19 So this is an e-mail from Jon Woodrum to  
11:29:45 20 you, dated February 26, 2006. Do you see that?

21 A. Yes.

22 Q. And if you scroll down to the paragraph that begins  
23 with "so if you concur."

24 A. Yes.

11:30:02 25 Q. He reports to you, "So if you concur, I will plan

1 accordingly. Perhaps you know Dale's schedule. I don't  
2 want to take ownership of this project in the customer's  
3 eyes, because, for one, I could not look them in the eye  
4 or even talk to them on the phone about this project so  
11:30:23 5 we will need to decide how that goes." You see that  
6 there, right?

7 A. I do.

8 Q. You never shared that with Hodell.

9 A. No need to.

11:30:30 10 Q. And you're in litigation with Mr. Woodrum also,  
11 aren't you?

12 MR. LAMBERT: Objection.

13 THE COURT: Objection sustained.

14 BY MR. MILLER:

11:30:41 15 Q. Take a look at Exhibit 121. I'm going to skip  
16 that. Let's move forward. Let's talk about the B1  
17 product for a couple minutes.

18 Go to Exhibit 130, please.

19 You testified earlier today that prior to  
11:31:37 20 hearing the phrase Sweet Spot, from Udi Ziv in April of  
21 2007, after the go-live, that you had never heard the  
22 phrase "Sweet Spot" in the context of B1. Correct?

23 A. And Hodell.

24 Q. B1 and Hodell. Correct?

11:31:57 25 A. Right.



1 Q. You had never heard the phrase "Sweet Spot" having  
2 to do with B1 or Hodell. Correct? I just want to be  
3 clear.

4 A. If I understand your question, yes.

11:32:08 5 Q. Okay. So we've got Exhibit 130 up here. Not a  
6 particularly good copy. But I think if you look at --  
7 if you go in three, four -- go to the end. That is  
8 probably the best way to do it. The very final pages.

9 We'll come back to that. The last page,  
11:32:31 10 please.

11 We're going to come to the Sweet Spot spot.  
12 Trust me.

13 Can we please go to the last page, Bob?

14 Okay. I just want to orient us.

11:32:56 15 I'm not doing a particularly good job of  
16 this.

17 How about if we do this? Let's go to the  
18 front. All the way to the front, to the blank white  
19 page. Do you see that on the screen?

11:33:10 20 A. Do I?

21 Q. Is your screen working right? It is like a white  
22 page?

23 A. Yes.

24 Q. And you had some exchanges yesterday with Mr.  
11:33:18 25 Lambert about the origin of documents and one of the

1 things I think we established was that if there is a,  
2 what's known as a Bates label, which is that LSi number  
3 towards the top third of the page, if that is on there  
4 and there is a cover sheet like this that this document  
11:33:34 5 came from LSi, right?

6 A. Okay.

7 Q. Fair enough?

8 A. Fair enough.

9 Q. Now, we'll try to establish the date of this  
11:33:40 10 document. Can you try to go to the last page of the  
11 document? It is a long document. It is like 30 pages  
12 long.

13 This will work. This page is good enough.

14 Can you blow up what's in the lower  
11:34:11 15 left-hand corner? There is a date, all the way down at  
16 the bottom, with a copyright. This is when it is boring  
17 to be a lawyer.

18 SAP AG 2005. Do you see that there?

19 A. I do.

11:34:30 20 Q. And it says SAP, small business product strategy,  
21 Gadi Shamia? You see that there?

22 A. I do.

23 Q. Now, Bob, can we go to the page of this exhibit  
24 that is in the lower left-hand corner, page twelve? It  
11:34:51 25 looks like this. In the lower left-hand corner, there is

1 a 12.

2 There you go. Okay.

3 So if you look at what is on the screen,  
4 you can see a timeline at the bottom. Okay? And then  
11:35:18 5 you see there is Q4, '05 over on the left. Right?

6 A. Yes.

7 Q. So we know this is an '05 document from the  
8 copyright, correct?

9 A. Yes.

11:35:31 10 Q. Do you think it is fair to say that this report  
11 from Gadi Shamia, and we'll talk about this in a moment,  
12 is from the latter part of 2005, judging by the timeline  
13 that's here. Correct?

14 A. Yes.

11:35:44 15 Q. And Gadi Shamia, he is knowledgeable about B1,  
16 right?

17 A. He what?

18 Q. He is very knowledgeable about B1?

19 MR. LAMBERT: Objection.

11:35:59 20 A. How would I know that?

21 Q. You are familiar with Gadi Shamia, are you not?

22 A. He was one of the owners of the products in Israel.

23 Q. If he was one of the owners of the B1 product in  
24 Israel, he would be pretty knowledgeable about B1,  
11:36:13 25 correct?

1 A. Unless he was a salesman like me, per your words.

2 Q. Let's take a look at what Gadi Shamia said. Take a  
3 look at the slide we had up earlier, Slide 7.

4 Do you see in the upper left-hand  
5 corner -- go back to where we were?

11:36:41

6 A. Small business report card?

7 Q. No. Back to the slide we had before. Sorry.

8 It says small businesses, 1 to 100  
9 employees. Do you see that there?

11:36:55

10 A. I do.

11 Q. Some are subsidiaries that are within the Ven  
12 diagram, right?

13 A. Yes.

14 Q. And some of them, part of the Ven diagram, are  
15 small businesses right?

11:37:07

16 A. Yes.

17 Q. And Gadi Shamia is reporting that the circle drawn  
18 that is beneath the heading, 1 to 100 employees, that's  
19 the Business One Sweet Spot. Correct?

11:37:18

20 A. That's what it says.

21 Q. And this was prior to the license agreement that  
22 was executed between Hodell and SAP. Correct?

23 A. Okay.

24 Q. And this was a couple of years after LSi signed a  
25 distribution agreement and an SDK with SAP to go out into

11:37:37

1 the world to sell B1, correct?

2 A. And several months before SAP accepted the order  
3 for 120 users, why did they accept the order if they  
4 didn't --

11:37:51 5 Q. Sir, my question to you, and we may go there --

6 A. Okay.

7 Q. But, my question to you is that in 2005, Gadi  
8 Shamia is referencing a Sweet Spot in connection with B1,  
9 right?

11:38:05 10 A. That's what this piece of paper says.

11 Q. Okay. And go to the front of this document,  
12 please.

13 And we also know that this document came  
14 from your files. Correct?

11:38:15 15 A. It did.

16 Q. And we know that Gadi Shamia was a respected,  
17 knowledgeable B1 person because he was one of the owners  
18 of the B1 product when it was back in Israel. Right?

19 A. Well, he must not speak for the Americas  
11:38:31 20 because --

21 Q. I'm asking you if he is who I asked you that he  
22 was. Correct? He is?

23 A. What was the question again.

24 Q. That he was one of the owners of the company that  
11:38:38 25 developed B1 over in Israel?

1 A. Correct.

2 Q. And if you go to the cover sheet of this, this  
3 document that came from the LSi files -- next page,  
4 please.

11:38:54 5 That can't be right. There we go.

6 Notwithstanding your testimony that you  
7 never heard of the Business One -- you never heard of  
8 the phrase Sweet Spot in the context of Business One  
9 until you saw Udi Ziv's April 2007 e-mails, in contrast  
11:39:10 10 to that there was a document in LSi's files from 2005  
11 that used the phrase "Sweet Spot" in connection with B1  
12 very prominently, correct?

13 A. Yes. But, I said that in relation to Hodell.

14 Q. It will speak for itself.

11:39:27 15 A. Have I seen numbers, yes, but in terms of Hodell,  
16 the first time I saw --

17 Q. So now your testimony is, oh, it's not that you  
18 never heard the phrase Business One -- pardon me.

19 Now, your testimony is not that you never  
11:39:43 20 heard of the phrase Sweet Spot in the context of Business  
21 One. Now your testimony is, oh, no, I just never heard  
22 of the phrase Sweet Spot in the context of Hodell --

23 A. You just said that earlier.

24 MR. LAMBERT: Objection.

11:39:55 25 THE COURT: Overruled.

1 A. Unless you are talking apples and I'm talking  
2 oranges, but we just addressed that.

3 Q. We want to make sure the jury understands.

4 A. Then ask it again, because I don't understand.

11:40:04 5 Q. I understood your testimony to be earlier today,  
6 and when I was asking you questions on cross-examination,  
7 that flat out, you had never heard the phrase Sweet Spot  
8 in the context of B1, whether it related to Hodell or any  
9 company in the history of mankind. That's what I  
11:40:21 10 understood. Okay? You understand that?

11 A. Understood.

12 Q. So now, your testimony is it is not that you never  
13 heard the phrase Sweet Spot in the context of Business  
14 One. Your testimony is oh, I never heard the phrase  
11:40:34 15 Sweet Spot in the context of Hodell using Business One?

16 A. And I think I stated that clearly earlier.

17 Q. We'll look at the transcript and see because now,  
18 we understand your testimony.

19 A. Okay.

11:40:42 20 Q. Okay. Take a look at Exhibit 123.

21 A. Okay.

22 MR. MILLER: Your Honor, if I may approach  
23 for one moment.

24 BY MR. MILLER:

11:41:31 25 Q. So we're back to 123. By the way, on Exhibit 130,

1 the one that had Sweet Spot kind of front and center in  
2 that circle, you know what I mean?

3 A. Yes.

4 Q. You never passed that along to Hodell. Correct?

11:42:04 5 A. I don't know.

6 Q. You don't know?

7 A. I don't know.

8 Q. Back to 123. These are -- if I can find my  
9 place -- these are January 30, '06 notes from a field

11:42:12 10 kickoff meeting. And just to place this, right --

11 A. I'm sorry?

12 Q. Just to place this in time, this is more than a  
13 year after the development agreement was executed.

14 Correct?

11:42:30 15 A. Okay.

16 Q. And it's a month or so after the license agreement.  
17 Right?

18 A. Correct.

19 Q. And you admitted in your deposition you have seen  
11:42:39 20 these notes before. Right?

21 A. I have. I'm sorry. I have.

22 Q. And if you look at the second -- sorry -- third  
23 page of this --

24 MR. LAMBERT: I object, Your Honor. Seeing  
11:42:54 25 the documents doesn't mean --



1 THE COURT: Give us a little context.

2 BY MR. MILLER:

11:43:07

3 Q. Okay. 123, from the top, these are field kickoff  
4 meeting notes. Do you see that in the upper left-hand  
5 corner?

6 A. Yes.

7 Q. Okay. And they are dated Monday, January 30, 2006.  
8 Right?

9 A. Correct.

11:43:14

10 Q. And these are notes that were prepared by IBIS/LSi  
11 personnel -- well, let me go even slower.

12 A field kickoff meeting is a meeting that  
13 SAP conducts where dealers and resellers like IBIS/LSi  
14 come to the meeting and interact with various people and  
15 learn about B1. Correct?

11:43:49

16 A. Correct.

17 Q. And IBIS/LSi, they would send people to field  
18 kickoff meetings?

19 A. We did.

11:43:49

20 Q. They had them annually?

21 A. Pardon me?

22 Q. Field kickoff meetings were at least annually?

23 A. Yes.

24 Q. And this is one of them, right?

11:43:50

25 A. Yes.

1 Q. And IBIS/LSi people went to this?

2 A. Yes.

3 Q. And here is someone from IBIS/LSi reporting back to  
4 you what happened at the field kickoff meeting, right?

11:43:59 5 MR. LAMBERT: Objection.

6 THE COURT: Overruled.

7 BY MR. MILLER:

8 Q. And if you go to the third page, at the top, third  
9 page, it says day two at the bottom. That is fine.

11:44:24 10 This is Gadi Shamia, vice president of  
11 solution management. He is the one they are describing.

12 If you scroll to the paragraph that starts  
13 with "they explained." Keep going. Scroll up, please.

14 Thank you.

11:44:43 15 "They explained our spot in the market, the  
16 Sweet Spot for SAP Business One," and then it says,  
17 double asterisk, right "look at this, 10 to 100  
18 employees." Do you see that there?

19 A. Yes.

11:44:59 20 Q. Correct?

21 A. Correct.

22 Q. And then two lines down, three lines down, 50  
23 concurrent users. Do you see that there?

24 A. Correct.

11:45:07 25 Q. And I'm hitting some of these in the upper right.

1 Up to 500 -- 5,000 transactions per month. Do you see  
2 that there?

3 A. Correct.

4 Q. And up to 50,000 items. Do you see that there?

11:45:19 5 A. Yes.

6 Q. And moderate customization. Right?

7 A. Correct.

8 Q. So the Sweet Spot for SAP Business One was  
9 described at this field kickoff meeting to IBIS/LSi as  
10 including what we just reviewed.

11 A. Yes.

12 Q. And these numbers, the ones I just reviewed, they  
13 are actually smaller numbers than their corresponding  
14 Hodell numbers. Right?

11:45:43 15 A. What are smaller numbers?

16 Q. I tried to save us a little bit of time. We can  
17 talk through it.

18 Go to the employee reference, there is 10  
19 to 100 employees. Hodell had more employees than that,  
11:45:56 20 right?

21 A. Yes.

22 Q. And three lines down, Hodell might have had more  
23 than 50 concurrent users, right?

24 A. Yes.

11:46:02 25 Q. And if you shift to the other ones I was looking

1 at, the 5000 transactions a month and up to 50,000 items,  
2 Hodell's corresponding numbers with respect to those  
3 items were higher. Right?

4 A. Correct.

11:46:15 5 Q. And your project was going to involve massive  
6 customization because of In-Flight Enterprise. Right?

7 A. Correct.

8 Q. And when you saw these notes, you testified that  
9 you were concerned.

11:46:33 10 A. When I saw these notes, I called Dan Kraus and  
11 shortly after that, Jeff Ashley, and asked them why they  
12 accepted our order less than 30 days prior to these  
13 numbers coming out, and they told me the same question,  
14 don't worry, there is no theoretical maximum, you are  
11:46:48 15 good to go.

16 Q. And you have no notes of that?

17 A. Just phone calls.

18 Q. In the history of this project and of this case,  
19 you have no notes of anyone at SAP, including Dan Kraus,  
11:47:04 20 saying to you there is no theoretical maximum with  
21 respect to B1, correct?

22 A. I don't know that.

23 Q. Can you point to one of those notes now?

24 A. As I sit here, no.

11:47:17 25 Q. Because we have been litigating this case since

1 November of 2008, right?

2 A. Yes.

3 Q. And you were a defendant and you actively defended  
4 yourself for a period of time in this case. Correct?

11:47:27 5 A. Correct.

6 Q. And the parties exchanged massive numbers of  
7 documents, hundreds of thousands of documents, right?

8 A. Correct.

9 Q. And there were multiple depositions, including  
11:47:36 10 yours. Right?

11 A. Correct.

12 Q. And right now, in court, you can't point to a  
13 single note that you ever took indicating that Dan Kraus  
14 or anybody else at SAP ever told you that for B1 there is  
11:47:49 15 no theoretical maximum. Correct?

16 A. Well, except one small -- sir.

17 Q. Sir, that is a yes or no --

18 A. That's a no. If these numbers were true why did  
19 they take the order less than 30 days before that.

11:48:04 20 MR. MILLER: Your Honor, move to strike.

21 THE COURT: You just have to answer the  
22 question asked if you can.

23 BY MR. MILLER:

24 Q. You're not aware of any notes where Dan Kraus or  
11:48:12 25 anybody else at SAP said there is no theoretical maximum

1 when it comes to B1?

2 A. As I sit here this instant, no. Do you want me to  
3 go find some?

11:48:24

4 Q. And you haven't pointed at any of those -- are you  
5 suggesting that you could go find them if we took a  
6 break?

7 A. Not if we took a break. Give me a month.

8 Q. We've given you seven years and you have not  
9 produced it yet. Isn't that true?

11:53:23

10 A. I don't know.

11 Q. Correct?

12 A. It could be out there.

13 Q. Well, you testified yesterday that Dan Kraus and  
14 others constantly --

11:53:23

15 A. Constantly?

16 Q. Constantly. You testified today consistent with  
17 that, that Dan Kraus and others constantly told you oh,  
18 there is no theoretical maximum when it comes to B1,  
19 right?

11:53:24

20 A. That's correct.

21 Q. But, you can't point, even though you say they told  
22 you this constantly, to a single note that reflects that.  
23 Correct?

24 A. Not as I sit here today.

11:53:24

25 Q. And just to be clear, I'm not just talking about

1 notes. You can't point to a single communication in the  
2 form of a proposal, an e-mail, a contract, a note, a  
3 napkin with notes on the side, nothing that has the word  
4 theoretical next to the word maximum. Correct?

11:53:25 5 A. I don't know if I can produce that.

6 Q. All right. And those concerns that you had, that  
7 you discussed with Dan Kraus, you never passed them along  
8 to Hodell. Correct?

9 A. He said don't worry about it.

11:53:25 10 Q. Sir, yes or no. Simple question.

11 A. No.

12 Q. Meaning correct, you didn't pass the concerns along  
13 to Hodell?

14 A. That's correct.

11:53:25 15 Q. Thank you.

16 Look at Exhibit 129. Well, just leave it  
17 right like that. I'm not sure we're going to go there or  
18 not.

19 A. I see it.

11:53:25 20 Q. I understand. We looked at Exhibit 130, right? A  
21 couple minutes ago. That was the one that had the big  
22 circle and Sweet Spot and had the reference 10 to 100  
23 employees, right?

24 A. Correct.

11:53:25 25 Q. And we looked at the field kickoff notes, right,

1 and they had the numbers that I just looked at with you,  
2 right? Or we reviewed together, correct?

3 A. Correct.

4 Q. Okay. You would agree that over time, the numbers  
11:53:25 5 that were referenced in the SAP materials with respect to  
6 the suitability of B1 for use by customers and how many  
7 users they would have or how big of a company B1 could  
8 handle were going down, correct?

9 A. Correct.

11:53:26 10 Q. Okay. Let's switch gears.

11 We talked earlier, you're not a technical  
12 person, right? You don't write software code, right?

13 A. I don't.

14 Q. Okay. And you can't say that the installation of  
11:53:26 15 B1 at Hodell was a failure. You don't agree that it was  
16 a failure?

17 A. State that over again.

18 Q. It had too many negatives? You would agree that  
19 the installation of B1 at Hodell was not a failure?

11:53:26 20 A. I would agree that the installation was not a  
21 failure?

22 Q. Correct. That's what you testified to at your  
23 deposition, right?

24 A. I'm just trying to understand what you're saying.

11:53:26 25 Q. Okay. Was the installation of B1 at Hodell a



1 failure?

2 A. The code was developed, the code did what it was  
3 supposed to do. It was slow.

4 Q. Right. So again, you would agree -- it wasn't a  
5 failure.

6 A. From a perspective of what?

7 Q. From the perspective of your testimony when you  
8 were deposed in this case? Well, let's do it again.

9 A. What is it, what are you saying? From a  
10 perspective of what?

11 Q. You have been understanding the common definition  
12 of the word failure?

13 A. I'm asking you what you are asking.

14 Q. It goes the other way. I'm sorry, I'm not trying  
15 to be difficult. But the way this process works, there  
16 is discovery and all the defense parts you were involved  
17 in and then we get to today and then it is my turn to  
18 finally ask you some questions. And the question I'm  
19 asking you is based on your common understanding of the  
20 word failure, was the installation of B1 at Hodell a  
21 failure?

22 A. I don't know how to answer that because I think  
23 you're trying to lead into something.

24 Q. I'm not. I'm not trying to lead you. I want to  
25 get your understanding -- I think we actually agree on

1 this. But I just want to get your understanding.

2 A. We developed software that ran for 18 months at a  
3 company. It ran slow. It was thrown out and here we are  
4 in court.

11:53:28 5 Q. Okay.

6 A. Tell me what that means.

7 Q. Thank you. Maybe it will be easier if we look at  
8 your deposition. You have been asked this before. Look  
9 at Page 266, please.

11:53:28 10 A. What was the number?

11 Q. 266.

12 "Question: So your testimony, or would you  
13 agree with me that the installation and operation of the  
14 SAP Business One software at Hodell was a failure,  
11:53:52 15 correct?

16 "Answer: No. I mean, they ran it -- they  
17 ran their business on it for two years."

18 Correct?

19 A. Okay.

11:54:00 20 Q. That was your testimony?

21 A. That's my testimony.

22 Q. So when you were deposed three years ago, you  
23 agreed that it was not a failure. Right?

24 A. I think I'm saying the same thing I said two years  
11:54:11 25 ago. They ran their business on it for two years.

1 Q. I think you might be. It wasn't a failure, right?

2 A. What?

3 Q. I think you are saying the same thing. It was not  
4 a failure.

11:54:21 5 A. I'm confused.

6 Q. Agreed?

7 A. I'm confused.

8 Q. All right. We're going to move on?

9 A. I feel like you are going for something that I  
11:54:46 10 don't know what you're trying to get to.

11 Q. Well, if you look at 266 --

12 A. It says no. They ran it on their business for two  
13 years.

14 Q. So the question was, when you were under oath, so  
11:54:59 15 your testimony or would you agree with me that the  
16 installation and operation of the SAP Business One at  
17 Hodell was a failure. That's the question.

18 And your answer is "no."

19 A. No. Then I will say no.

11:55:09 20 Q. So at your deposition, it is clear now you  
21 testified that the installation and operation of B1 was  
22 not a failure. Right?

23 A. Correct.

24 Q. And you're basically saying the same thing today?

11:55:22 25 A. Correct.

1 Q. Because they ran it for two years?

2 A. Correct.

3 Q. And you actually pursued Hodell for the final  
4 \$60,000 payment because you think you delivered what you  
11:55:33 5 were supposed to deliver, which was a working B1  
6 solution?

7 MR. LAMBERT: Objection.

8 THE COURT: Overruled.

9 BY MR. MILLER:

11:55:40 10 Q. Correct?

11 A. Pursued means what, a phone call?

12 Q. You brought a counterclaim against Hodell seeking  
13 the \$60,000, right?

14 A. Yes.

11:55:45 15 Q. So you wanted the full \$300,000. You had gotten  
16 240 and you wanted the final 60?

17 A. Correct.

18 Q. And that was the nature of the counterclaim?

19 A. Correct.

11:56:28 20 MR. MILLER: Your Honor, just a minute.

21 I'm coming close to being done.

22 BY MR. MILLER:

23 Q. Take look at Exhibit 311 and 312. I don't have  
24 copies of these with me, so I'm just going to have to  
11:58:12 25 work off the screen, but it's okay.

1                               You were here for the last couple days,  
2                               right?

3           A.       I have been.

4           Q.       And you were present when Mr. Reidl, Kevin Reidl  
11:58:29 5                   was examined with respect to letters and e-mail  
6                   communications that Hodell was sending in 2001 and 2003  
7                   about the FACTS software solution that Dale had  
8                   previously installed, right?

9           A.       I did.

11:58:46 10          Q.       In fact, this was one of them, 311, right?

11                           MR. LAMBERT: Objection. He is not a party  
12                           to the e-mail.

13                           THE COURT: Objection sustained.

14                           BY MR. MILLER:

11:58:55 15          Q.       Did Dale Van Leeuwen tell you when -- at any time  
16                   prior to when LSi acquired IBIS that IBIS had come close  
17                   to litigation with Hodell?

18          A.       No.

19          Q.       And did Dale tell you that at any time prior to  
11:59:14 20                   when IBIS/LSi signed the contract with Hodell?

21          A.       No.

22          Q.       And did Dale tell you that any time ever?

23          A.       No.

24          Q.       And you found out in this litigation, correct?

11:59:28 25          A.       I did.

1 Q. So you found out about this almost being litigation  
2 back in '01 and '03. You didn't find that out until you  
3 were in litigation with Hodell?

4 A. That's correct.

11:59:37 5 Q. Take a look at your -- grab your deposition  
6 transcript, please.

7 We had an exchange earlier. We actually  
8 had multiple exchanges.

9 A. Who, you and me?

11:59:52 10 Q. Yes, about whether you had ever heard the phrase  
11 "Sweet Spot" in the context of B1.

12 A. Okay.

13 Q. And your testimony was -- and there was a  
14 distinction drawn between whether you heard of the phrase  
12:00:12 15 Sweet Spot in connection with B1 on the other hand that  
16 was a possibility -- I just want to be clear. Your point  
17 was you had never heard of the phrase Sweet Spot in the  
18 context of Hodell and B1. Correct?

19 A. Right. Let me say this one more time for the  
12:00:28 20 record.

21 Q. Okay.

22 A. I never heard SAP ever say Hodell exceeds the Sweet  
23 Spot of SAP Business One. Ever.

24 Q. And your point was in fact you had never even heard  
12:00:39 25 the phrase Sweet Spot in the context of Hodell and B1.

1 Right? Correct?

2 A. In the text I just said.

3 Q. Okay. And you -- so let's look at Page 337 of  
4 your deposition.

12:01:05 5 Let me know when you have it handy.

6 So this takes a little bit of back and  
7 forth before we get to the part that is relevant to Sweet  
8 Spot, but on Page 14.

9 Question: "Have you seen Exhibit 77  
12:01:31 10 before?

11 Answer: "Most of it.

12 Question: "I want to ask you about some of  
13 the e-mails in Exhibit 77 we already talked about.

14 Answer: "Yes.

12:01:40 15 Question: "In an e-mail to Udi Ziv dated  
16 April 15, 2007. Do you see that?

17 Answer: "Yes.

18 Question: "Do you recall sending that  
19 e-mail?

12:01:51 20 Answer: "Yes."

21 Do you see that there?

22 We get to the next page. You are replying  
23 to information Udi provided you, yes?

24 Answer: Correct.

12:02:02 25 In response to an earlier email, correct?

1 And then you say yeah, correct. Right. You follow that?

2 A. Kind of.

3 Q. Let's get to Line 7. "He is letting you know that  
4 Hodell's environment is far outside the Sweet Spot for  
12:02:22 5 Business One." Correct?

6 A. Correct.

7 Q. So that's a reference to the e-mail you talked  
8 about earlier where Udi Ziv used the phrase "Sweet Spot"  
9 in connection with Hodell, correct? That's a reference  
12:02:37 10 to that?

11 A. Okay.

12 Q. "Question. Is this the first you've heard of a  
13 Sweet Spot for SAP Business One?

14 "Answer: Correct.

12:02:47 15 "Question: You never heard of the term  
16 "Sweet Spot" used in relation to Business One before this  
17 date?

18 "Answer: No."

19 Do you see that there?

12:02:58 20 A. Yes.

21 Q. And that was your testimony, under oath, three  
22 years closer to the time the events of this case.  
23 Correct?

24 A. What e-mail are we talking about here?

12:03:06 25 Q. Exhibit 77. Do you want to call it up?



1 A. Yes. Can you zoom it?

2 Q. Go to the bottom. That's one way to do it.

3 A. Okay. I got it. Now go up to his.

4 Q. I will scroll down.

12:03:40 5 A. Go down.

6 Q. Keep going. Right here. Scroll up, just to be  
7 clear.

8 On April 13, 2007, Udi Ziv is writing to  
9 you, right?

12:03:54 10 A. Yes.

11 Q. Do you see that e-mail?

12 A. Yes.

13 Q. And he says "Dan, as you know, this customer's  
14 environment is far outside the Sweet Spot of Business

12:04:02 15 One, with 120 users, et cetera, and therefore, we  
16 anticipate that such performance issues will come up."  
17 You see that there, right?

18 A. Yes.

19 Q. If you go back to your deposition, on Page 377, you  
12:04:15 20 would agree, right there on Line 5, it says, "Review

21 Exhibit 377 and let me know when you are finished,"  
22 right? That's the question. Do you see it there on  
23 Line 5?

24 A. Slow down a little bit.

12:04:27 25 Q. Page 337, Line 5.

1 A. All right.

2 Q. My question is "Review Exhibit 77 and let me know  
3 when you are finished." Right?

4 A. Yes.

12:04:39 5 Q. So the exhibit that you are reviewing in your  
6 deposition back in 2012 is the same one we just pulled up  
7 on the screen, Exhibit 77. Fair enough?

8 A. Yes.

9 Q. And then there is the back and forth and you go to  
12:04:51 10 Page 338, at Line 7, and the question is "He is letting  
11 you know that Hodell's environment is far outside the  
12 Sweet Spot for Business One, correct?"

13 And your answer is correct, right?

14 A. So this is after we went go-live?

12:05:07 15 Q. Yes. After you went go-live, you wrote to Udi Ziv,  
16 right?

17 A. Correct.

18 Q. And Udi Ziv sent you back Exhibit 77 --

19 A. Saying it was outside -- okay.

12:05:20 20 Q. And you were asked about that at your deposition  
21 here, correct?

22 A. Correct.

23 Q. And then the question was, "He is letting you know  
24 that Hodell's environment is far outside the Sweet Spot  
12:05:28 25 for Business One, correct?" And your answer is

1 "correct"?

2 A. Right.

3 Q. And the next question is "Is this the first you  
4 heard of a Sweet Spot for SAP Business One?

12:05:39 5 "Answer: Correct?"

6 That's your testimony, right?

7 A. Correct.

8 Q. And then the next question is, "You never heard of  
9 the term 'Sweet Spot' used in relation to Business One  
12:05:48 10 before that date," and your testimony was, "no." Right?

11 A. Okay.

12 MR. MILLER: No further questions.

13 THE COURT: We'll break for lunch. About

14 1:25?

12:06:38 15 THE JUROR: Downstairs.

16 THE COURT: Keep in mind the admonition.

17 (Luncheon recess had.)

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1                   WEDNESDAY, JUNE 17, 2015, 1:31 P.M.

2                   (Proceedings outside the presence of the jury:)

3                   THE COURT: You wanted to talk to me?

4                   MS. LUARDE: Yes, Your Honor. We have a  
13:31:36 5                   few issues. The first one relates to Mr. Lowery and  
6                   Mr. Van Leeuwen and the conduct of the examination. Both  
7                   of these individuals are actually defendants in the case,  
8                   although there was a default against them. They are  
9                   still, we can still get a judgment against them as a  
13:31:37 10                  defendant, and we want to make sure we are able to take  
11                  their examination as if on cross exam.

12                  THE COURT: You don't think that Lambert  
13                  was cross-examining him the whole time?

14                  MS. LUARDE: He was. He was trying. But I  
13:31:37 15                  want to make sure for the orderly conduct of the rest of  
16                  the day --

17                  THE COURT: Is Van Leeuwen coming in  
18                  person?

19                  MS. LUARDE: We served him and will have  
13:31:37 20                  him through the remote transmission process. Along with  
21                  that, we were asked a question. Apparently you have to  
22                  decide how you want this to proceed, whether the court  
23                  reporter would be here or in the remote location to take  
24                  down his testimony or both.

13:31:37 25                  (Discussion off the record.)

1 MS. LUARDE: I'll make sure they know that.

2 The last question relates to the video deposition clips  
3 that we intend to play. There has been some back and  
4 forth between us and opposing counsel over how that will  
13:31:37 5 be performed. We went through and we designated our  
6 selections. They did the same. We exchanged the  
7 selections early on. We've since modified some of ours,  
8 let opposing counsel know. But, what we want to do is  
9 just play our selections in our case in chief. Opposing  
13:31:37 10 counsel, as I understand it, wants us to just play the  
11 deposition straight through with the designations. You  
12 know, you are --

13 THE COURT: What do you mean?

14 MS. LUARDE: So for example, we selected a  
13:31:37 15 handful of questions --

16 THE COURT: Yes.

17 MS. LUARDE: And we'll skip forward about  
18 20 pages and have another handful of questions and we  
19 just want to play what we selected and obviously items  
13:31:37 20 that support our case. Opposing counsel wants us to just  
21 play everything. But --

22 THE COURT: When you say everything, the  
23 whole deposition?

24 MS. LUARDE: No. Our selections and  
13:31:37 25 then --

1 MR. MILLER: The counter designations.

2 MS. LUARDE: They have something on page 15  
3 and we have something on page 20. They want us to  
4 include their selection in there.

13:31:37 5 THE COURT: I guess what you have to do,  
6 you can play yours and you can just -- as if on cross,  
7 play yours.

8 MR. MILLER: Your Honor, if I may, on both  
9 points, first, with respect to Mr. Van Leeuwen, I  
13:31:37 10 understand a subpoena has been served. It is our  
11 understanding he testified on Tuesday.

12 MR. LAMBERT: I think it was Monday.

13 MR. MILLER: Fine. With respect to the  
14 counterdesignations, Your Honor, all we want to do is  
13:31:38 15 what the Rule calls for, which is fair. This is supposed  
16 to be done fairly. If they designate a piece of people  
17 and --

18 Testimony and leave out -- we have  
19 designations where they designate a piece of testimony  
13:31:38 20 but leave out the thing he says after that or designate a  
21 piece of testimony, leave out the middle part that  
22 matters, and then go back --

23 THE COURT: I'm totally with you. This is  
24 not my first rodeo. I don't -- one at a time. If you  
13:31:38 25 feel that way, they can designate it and you can play the

1 whole thing. It may take longer, but if that's what you  
2 want to do, that's what you want to do.

3 MR. MILLER: We discussed this with counsel  
4 and prepared the tapes. At the pretrial, counsel said  
13:31:38 5 they will do it however they like. We want to do it in  
6 accordance with the rules. There is two pieces to it.  
7 When a piece needs to be included in order for the  
8 testimony to be fairly understood, we ought to play it at  
9 once --

13:31:38 10 THE COURT: You are repeating yourself. I  
11 know exactly what you are saying.

12 MR. MILLER: Okay. When there is another  
13 designation we make that is five pages before that is on  
14 a different topic, I agree that should be played later.  
13:31:38 15 That's not really a counterdesignation. That is our own  
16 designation. We can deal with that in our case, but when  
17 they are playing testimony the rule says they are not  
18 allowed to unfairly take things out and play it like out  
19 of context, the jurors are entitled to hear it in  
13:31:38 20 context.

21 My point is we should review the transcript  
22 and when we run into situations where leaving out  
23 snippets would be unfair because it would mislead the  
24 jury, we should not let them get away with that and play  
13:31:38 25 that whole section.

1 THE COURT: I get your point.

2 MR. MILLER: Thank you.

3 MS. LUARDE: Your Honor, again --

4 THE COURT: You already won.

13:31:38 5 MS. LUARDE: Thank you. I will shut up,

6 then. Thank you.

7 MR. MILLER: Now I'm confused, Your Honor.

8 THE COURT: You should not be. It is what

9 I said at the beginning. They can do their designation.

13:31:38 10 At the time of cross, you can play the whole thing and

11 put it in context if you want.

12 MS. LUARDE: That's all I have.

13 THE COURT: You may redirect.

14 REDIRECT EXAMINATION

15 BY MR. LAMBERT:

16 Q. Good afternoon. Mr. Miller was asking you some  
17 questions about the SDK agreement with IBIS. Do you  
18 recall that line of questioning?

19 A. I do.

13:33:15 20 Q. And can you pull up the SDK agreement, Exhibit 32?

21 When did LSi acquire IBIS?

22 A. April 2004. April 28.

23 Q. Can you look at the SDK agreement and tell me the  
24 date of the SDK agreement, when it was signed?

13:33:40 25 A. It was completed in December, 2003. I can't make



1 out the date. Looks like the 31st day of December.

2 Q. December 31, 2003? Can you turn to Section 5.2 of  
3 this agreement, the section Mr. Miller was asking you  
4 about.

13:34:05 5 A. Okay.

6 Q. I'm sorry, Kim, 5.2. The termination section. Do  
7 you recall that?

8 A. I do.

9 Q. And he was asking you some questions implying that  
10 this agreement had terminated after 180 days or it  
11 terminated after 180 days?

12 A. Correct.

13 Q. Now, you testified that LSi acquired IBIS in April  
14 of 2004.

13:34:46 15 A. Correct.

16 Q. And that this agreement was signed in December of  
17 2004.

18 THE COURT: 2003.

19 Q. December, 2003. Correct?

13:34:55 20 A. Correct.

21 Q. 180 days is about six months. Correct?

22 A. Correct.

23 Q. How many months are in between December and April?

24 A. Four.

13:35:02 25 Q. So within the time frame of this 180-day clause.

1 Correct?

2 A. Yes.

3 Q. Mr. Miller asked you some questions about whether  
4 there was any document in the universe that you were  
13:35:19 5 aware of that talked about Business One being appropriate  
6 for 500 users, do you recall that?

7 A. I do.

8 Q. Can you turn to Exhibit 36? It should be in your  
9 binder or you can look at it on the screen if you want.

13:35:33 10 A. Should be on my monitor?

11 Q. It should be in your binder --

12 A. Oh, in my binder.

13 Q. Or you can look at it on the screen, whichever you  
14 prefer.

13:35:42 15 A. Which section?

16 Q. Exhibit 36, please.

17 A. Okay.

18 Q. This is a document in the universe that you believe  
19 says 500 users is appropriate for Business One?

13:35:58 20 A. Yes, this document I'm looking at says that.

21 Q. Can you pull up Exhibit 618?

22 MR. MILLER: Your Honor, can the jury see  
23 what he is referring to instead of hit-and-run on the  
24 exhibit?

13:36:17 25 THE COURT: You can, can't they? Is it on

1 the screen?

2 MR. LAMBERT: I'm trying to be brief, Your  
3 Honor. If you want to zoom in.

4 MR. MILLER: If it says that, see where it  
13:36:25 5 says that.

6 BY MR. LAMBERT:

7 Q. Mr. Lowery, can you point to that place?

8 A. Whether you have 5 employees or 500. Is that what  
9 you are saying?

13:36:43 10 Q. Yes. Thank you.

11 Can we pull up Exhibit 618? Exhibit 618 is  
12 an SAP Business One Whitepaper. Do you see that?

13 A. Yes.

14 Q. It says SAP's logo on it. Correct?

13:37:07 15 A. I'm sorry?

16 Q. It has SAP's logo on it. Correct?

17 A. It does.

18 Q. And it's published by SAP?

19 A. It is.

13:37:14 20 Q. Can you turn to Page 7 of that document?

21 A. Okay.

22 Q. Is this another document that supports your  
23 contention that Business One would be appropriate for 500  
24 users?

13:37:29 25 A. Let's see. Section 2.8. It supports an unlimited

1 number of simultaneous user transactions. Yes.

2 Q. Is that consistent with your testimony with regard  
3 to what you heard from Mr. Kraus?

4 A. Yes.

13:37:45 5 Q. Mr. Miller asked you some questions about your  
6 knowledge regarding the DI-API, correct?

7 A. Yes.

8 Q. The DI-API is part of the core Business One  
9 software. Correct?

13:38:04 10 A. Yes.

11 Q. And based on your experience with the Hodell  
12 implementation, it was your understanding that the DI-API  
13 was causing the problems Hodell experienced. Correct?

14 A. I'm sorry for asking you to repeat that.

13:38:16 15 Q. Based upon your experience with the Hodell  
16 implementation, it was your understanding or belief that  
17 the DI-API was causing the problems Hodell was  
18 experiencing?

19 A. Yes.

13:38:29 20 Q. Now, you testified when Mr. Miller was questioning  
21 you about SAP not having its own sales force to sell  
22 Business One. Do you remember that?

23 A. I do.

24 Q. And you said something to the effect of it was the  
13:38:44 25 cheapest way for SAP to get a sales force out there

1 selling Business One.

2 A. Correct.

3 Q. LSi and the other channel partners were SAP's sales  
4 force. Correct?

13:38:56 5 A. That's correct.

6 Q. You have been in the computer software business for  
7 more than 40 years; that was your testimony?

8 A. You keep bringing that up. Yes. Can we count in  
9 celsius or something.

13:39:16 10 Q. 43 years is that what it was?

11 A. 43.

12 Q. As a computer salesperson do you have to make  
13 representations to software that you are selling to  
14 customers?

13:39:24 15 A. Yes.

16 Q. When Mr. Miller was walking you through the  
17 marketing and distribution agreement that LSi signed with  
18 SAP, he took you to a section that said something to the  
19 effect of you agree not to make representations about the  
13:39:43 20 software. Do you remember that?

21 A. I do.

22 Q. How are you supposed to sell the software if you  
23 cannot make representations to the customers about it?

24 A. That's a great question. I don't know.

13:39:50 25 Q. You don't know?

1 A. How would you -- you have to make some  
2 representations.

3 Q. Let's look at Exhibit 30 real briefly to go over a  
4 couple things you were asked by Mr. Miller.

13:40:06 5 A. 30?

6 Q. Yes.

7 A. Okay.

8 Q. Mr. Miller kept referring to this as a distribution  
9 agreement. Do you recall that?

13:40:16 10 A. He did, yes.

11 Q. What's the actual title of that document?

12 A. SAP Business One Software Marketing and  
13 Distribution Agreement.

14 Q. So it is a marketing and distribution agreement.  
15 Is that accurate?

13:40:24

16 A. Correct.

17 Q. Not just a distribution agreement?

18 A. Correct.

19 Q. And it concerns the marketing of the SAP software.  
20 Correct?

13:40:30

21 A. Correct.

22 Q. Marketing by LSi. Correct?

23 A. Marketing by LSi.

24 Q. And this agreement was never given to Hodell. Is  
25 that accurate?

13:40:45

1 A. No.

2 Q. And the SDK agreement that Mr. Miller went over  
3 with you that IBIS signed, that wasn't given to Hodel  
4 either, was it?

13:40:55 5 A. I can't imagine it, no.

6 Q. Looking at the top of that agreement, the agreement  
7 identifies the parties to the marketing and distribution  
8 agreement. Do you see that?

9 A. The --

13:41:14 10 Q. This agreement is made effective this --

11 A. Yes, I see it.

12 Q. By and between who?

13 A. Between SAP America, Inc., a Delaware corporation,  
14 and LSi Lowery Systems.

13:41:30 15 Q. It is between SAP America and LSi, correct?

16 A. Correct.

17 Q. Can you turn to the end, the document that Mr.  
18 Miller directed you to during this examination, 30.28?  
19 It is a signature page.

13:41:51 20 A. Okay.

21 Q. The signatories to this agreement are yourself on  
22 behalf of LSi Lowery Systems, correct?

23 A. Correct.

24 Q. And a gentleman by the name of Gary Fromer on  
13:42:04 25 behalf of SAP America Inc.?

1 A. Correct.

2 Q. There is no signature line for SAP AG, is there?

3 A. No.

4 Q. You don't recall signing a similar document with

13:42:17 5 SAP AG, do you?

6 A. Correct.

7 Q. You were asked about the license agreement that

8 Hodell signed. Do you recall that?

9 A. Yes, I do.

13:42:27 10 Q. Mr. Miller described that as a template or a form

11 agreement. Do you recall that line of testimony?

12 A. I do.

13 Q. Do you recall anyone during your time selling SAP

14 Business One being able to alter or change the terms of

13:42:41 15 that template or form agreement?

16 A. Possibly, but I can't say for sure.

17 Q. You can't recall any particular instance where an

18 end user customer was able to change the terms of that

19 license agreement?

13:42:56 20 A. Correct. Like terms of payment or something like

21 that?

22 Q. And you weren't -- you weren't the LSi employee

23 that actually presented that agreement to Hodell,

24 correct?

13:43:09 25 A. No.



1 Q. You weren't there when it was signed?

2 A. No.

3 Q. And you don't know what was said to Hodel as part  
4 of that signing process. Correct?

13:43:18 5 A. No.

6 Q. When did the development agreement -- can you pull  
7 up 291?

8 Mr. Miller asked you a series of questions  
9 about the development agreement and identified, you know,  
13:43:43 10 what parties are identified under the development  
11 agreement. Do you recall that?

12 A. I do.

13 Q. Was that agreement drawn up by an attorney?

14 A. I don't think so.

13:44:00 15 Q. You don't recall an attorney being involved in  
16 putting that together?

17 A. I don't recall an attorney, no.

18 Q. At the time LSi acquired IBIS, did you consider LSi  
19 and IBIS to be one and the same company?

13:44:15 20 A. Yes.

21 MR. MILLER: Objection, Your Honor, some  
22 sort of corporate legal conclusion.

23 THE COURT: Overruled.

24 BY MR. LAMBERT:

13:44:21 25 Q. You can answer.

1 A. Oh. Yes.

2 Q. Did you believe -- was it your understanding that  
3 after LSi acquired IBIS, LSi and IBIS could continue  
4 marketing and selling Business One to customers?

13:44:35 5 A. Yes.

6 Q. Did anyone at SAP ever tell you that IBIS couldn't  
7 market and sell Business One to customers?

8 A. No.

9 Q. Can you pull up Exhibits 9 and 11, please?

13:44:48 10 Exhibits 9 and 11 are documents that you  
11 sent to Hodell as part of the sales and marketing process  
12 of Business One. Correct?

13 A. Yes.

14 Q. And it indicates that they are on IBIS Group  
13:45:13 15 letterhead. Correct?

16 A. Correct.

17 Q. And it has the SAP logo on there?

18 A. It did.

19 Q. Was that put there with SAP's authorization?

13:45:21 20 MR. MILLER: Objection, Your Honor. Can he  
21 testify as to how it got there instead of -- it's a  
22 leading question.

23 BY MR. LAMBERT:

24 Q. Who put the logo there?

13:45:28 25 A. Our administrator up in our Chicago office.

1 Q. Where did they get it from?

2 A. The SAP partner website.

3 Q. Did SAP ever tell you -- did SAP ever tell you,  
4 hey, stop -- IBIS, stop putting our logo on your  
13:45:49 5 letterhead?

6 A. No.

7 MR. MILLER: Objection, Your Honor. There  
8 is no foundation that SAP knew it was being used in this  
9 document.

13:45:55 10 THE COURT: You can explore that.

11 BY MR. LAMBERT:

12 Q. I'll restate the question, or state it again.

13 Did anyone from SAP ever say, "Hey, IBIS,  
14 stop putting your logo on your letterhead"?

13:46:09 15 A. No. Everyone at SAP knew IBIS was LSi.

16 MR. MILLER: Objection, Your Honor.

17 THE COURT: Same.

18 MR. MILLER: Move to strike.

19 BY MR. LAMBERT:

13:46:18 20 Q. The development agreement we were just looking at  
21 was signed in December of 2004. Correct?

22 A. Correct.

23 Q. And it concerned the purchase of Business One  
24 licenses. Correct?

13:46:29 25 A. Correct.

1 Q. And at the time Hodell signed that agreement, LSi  
2 considered Hodell obligated to buy those Business One  
3 licenses. Correct?

4 A. We did.

13:46:42 5 MR. MILLER: Objection.

6 THE COURT: Overruled.

7 Q. What was your answer?

8 A. Yes, we did.

9 Q. And Hodell was going to be paying \$300,000 towards  
13:46:50 10 those licenses?

11 A. Yes.

12 Q. And Hodell did not sign a license agreement when it  
13 signed the development agreement. Correct?

14 A. No, it did not.

13:47:00 15 Q. The license agreement that Mr. Miller showed you  
16 was a full year later. Correct?

17 A. Correct.

18 Q. A year after Hodell had become obligated to  
19 purchase 80 Business One licenses?

13:47:12 20 MR. MILLER: Objection, Your Honor. He  
21 just testified as to what LSi thought, not whether they  
22 were actually obligated.

23 THE COURT: You're right.

24 MR. MILLER: Thank you.

13:47:18 25

1 BY MR. LAMBERT:

2 Q. A year after, in LSi's mind, Hodell was obligated  
3 to buy 80 Business One licenses, correct?

4 A. Correct.

13:47:27 5 Q. Do you know how much money Hodell paid in between  
6 the time it signed the development agreement and the  
7 license agreement?

8 A. To who?

9 Q. To LSi.

13:47:39 10 A. I would have to add it up.

11 Q. Would you disagree with me if I told you it was at  
12 least \$277,000?

13 A. No.

14 MR. MILLER: Objection, Your Honor.

13:47:53 15 THE COURT: Sustained.

16 A. Because this -- these would include --

17 THE COURT: That's all right, Mr. Lowery.  
18 You don't have to answer.

19 THE WITNESS: I'm sorry.

13:48:01 20 BY MR. LAMBERT:

21 Q. Mr. Miller, during his questioning of you, admitted  
22 that Business One was a fresh product. Do you recall  
23 that?

24 A. Yes.

13:48:09 25 Q. And he said it was a new product. Do you recall

1 that?

2 A. Yes.

3 Q. Can you turn to -- can you pull up 314?

4 A. Section 14?

13:48:22 5 Q. I'm going to pull up 314. I don't think it is in  
6 the binder.

7 MR. MILLER: Your Honor, I want to be  
8 clear. There was a question I asked the witness --

9 THE COURT: I don't even know what this  
13:48:31 10 exhibit is.

11 MR. MILLER: The question was, "Mr. Miller  
12 admitted blank."

13 THE COURT: That is a completely improper  
14 question. You're right.

13:48:38 15 MR. MILLER: Thank you.

16 BY MR. LAMBERT:

17 Q. Do you recall the line of questioning about being  
18 asked whether Business One was a fresh product?

19 A. I do.

13:48:44 20 Q. And whether it was a new product?

21 A. I do.

22 Q. Okay. Exhibit 314 is a document -- does that look  
23 familiar to you?

24 A. If you could zoom it up a little bit.

13:48:58 25 Q. You might need to scroll through it for my

1 questioning, but do you recall seeing Exhibit 314 before?

2 A. Yes.

3 Q. This is one of the documents Kevin testified that  
4 he saw as part of the marketing of Business One to  
13:49:14 5 Hodell.

6 A. All right.

7 Q. Is there anything in this marketing literature  
8 published by SAP that mentions Business One being a fresh  
9 product?

13:49:25 10 A. I don't see anything.

11 Q. There is nothing in the marketing literature  
12 telling Hodell that Business One is a fresh product, is  
13 there?

14 A. No.

13:49:43 15 Q. There is nothing in there telling Hodell that  
16 Business One is a new product, is there?

17 A. No.

18 Q. In fact, Kim, can you cycle through a couple pages?

19 Can you zoom in there? I'm sorry. Go to  
13:50:14 20 the next page, Kim.

21 Isn't it true that this document says  
22 hundreds of businesses around the world are already using  
23 SAP Business One? Correct?

24 A. Yes.

13:50:32 25 Q. During the development of In-Flight, do you

1 remember being asked about the development of In-Flight,  
2 correct?

3 A. I'm sorry. Could you ask that?

13:50:48

4 Q. Do you remember being asked by Mr. Miller about the  
5 development of the In-Flight software?

6 A. Yes.

7 Q. And marrying it with Business One I think was one  
8 of the terms that was used? In-Flight was going to be  
9 integrated in the Business One product, right?

13:51:03

10 A. Yes.

11 Q. Did anyone from LSi work with SAP during that  
12 process?

13 A. The integration?

14 Q. Yes.

13:51:09

15 A. Yes.

16 Q. Were they in contact with SAP personnel?

17 A. Yes.

18 Q. Do you know anyone in particular at SAP?

13:51:19

19 A. Eddie Neveux was front and center to the technical  
20 people. They had people they talked to when they had  
21 questions on top of him. Manfred Weis or something like  
22 that comes to mind.

23 Q. And Mr. Miller asked you some questions about  
24 Business One, or the In-Flight being a customization to  
13:51:39 25 Business One. Correct?



1 A. Yes.

2 Q. And, in fact, that was how Business One was  
3 marketed. Correct?

4 A. Correct.

13:51:45 5 Q. As being highly customizable. Correct?

6 A. Yes.

7 Q. That was one of the main selling points for  
8 Business One?

9 A. Yes, it was.

13:51:53 10 Q. And Mr. Miller asked you some questions about the  
11 testing of In-Flight and whether it had been tested. Do  
12 you recall that line of questioning?

13 MR. MILLER: Objection, Your Honor. I  
14 don't think I did ask those questions.

13:52:08 15 THE COURT: Overruled.

16 A. I do remember that.

17 Q. And he wouldn't let you answer whether he thought  
18 that In-Flight was tested?

19 A. Correct.

13:52:15 20 Q. Did LSi, in fact, test In-Flight before it was  
21 installed at Hodell?

22 A. Yes.

23 Q. And did -- did LSi test In-Flight before Hodell  
24 went live using the software?

13:52:32 25 A. Yes.

1 Q. How so? How did you do the testing?

2 A. It was a continual test, as each piece of code was  
3 written by Joe Guagenti and his staff, they would go  
4 through a systems assurance process, try to break it.

13:52:52 5 Q. Mr. Miller asked you whether you thought that  
6 Business One implementation was a failure. Do you recall  
7 that line of questioning?

8 A. I do.

9 Q. You testified that Hodell only ran Business One for  
13:53:04 10 two years?

11 A. Correct.

12 Q. You have been in the computer -- the last time I'm  
13 going to bring this up. You have been in the software  
14 business for 43 years. Correct?

13:53:15 15 A. Correct.

16 Q. And in your experience, how much of that experience  
17 has been selling ERP systems?

18 A. 90 percent.

19 Q. Back in 2007, would two years be the amount of time  
13:53:30 20 you would have expected Hodell to run Business One?

21 A. I was expecting them to run it forever, but I'm not  
22 sure I understand the question.

23 Q. Well, prior to installing Business One at Hodell,  
24 how long did you expect Hodell would continue using  
13:53:54 25 Business One after it went live?

1 MR. MILLER: Objection, relevance.

2 THE COURT: Overruled.

3 A. Forever. I mean, you know, for the life of the  
4 system.

13:54:00 5 Q. Not two years, correct?

6 A. Not two years, no.

7 Q. Mr. Miller asked you some questions about some  
8 deposition testimony you gave. Do you recall that?

9 A. I do.

13:54:09 10 Q. And he pointed to one question and one answer from  
11 your deposition. Do you recall that line of testimony?

12 A. I do.

13 Q. He didn't ask you to read the whole line of  
14 questioning, did he?

13:54:23 15 A. No.

16 Q. Can you turn to Page 266 in your deposition?

17 A. 256?

18 Q. 266.

19 A. 266?

13:55:03 20 Q. Yes, sir.

21 A. I'm there.

22 Q. On 266, Line 15 is the question that Mr. Miller  
23 read you, correct? So your testimony would be that the  
24 installation and operation of Business One at Hodell was  
13:55:18 25 a failure. Correct?

1 A. Correct.

2 Q. And he read your answer, "No, I mean they ran their  
3 business on it for two years"?

4 A. Right.

13:55:24 5 Q. He didn't read you the rest of that line of  
6 questioning, did he?

7 A. No.

8 Q. Let's go back. Let's read the rest of that  
9 questioning, shall we?

13:55:32 10 A. Okay.

11 Q. There is a follow-up question on Line 23. Do you  
12 see that?

13 A. Yes.

14 Q. "You would agree with me it did not work as it was  
13:55:40 15 supposed to work, correct?"

16 And there are intervening objections, and  
17 you asked me a question on Page 267. What did you ask  
18 me?

19 A. "Are you talking about SBO or In-Flight."

13:55:57 20 Q. I said, "I'm talking about Business One." What was  
21 your answer?

22 A. "I believe that the SAP Business One DI-API  
23 problems were unacceptable."

24 Q. And I asked you, "And they were never fixed,"  
13:56:10 25 right?

1 A. "No."

2 Q. They were never fixed, correct?

3 A. Correct.

4 Q. He didn't ask you about Page 835 of your

13:56:16 5 deposition, did he?

6 A. 835?

7 Q. 835.

8 A. I'm there.

9 Q. There is a question I asked you on Page 835, Line

13:56:44 10 16. This is the line of questioning Mr. Miller didn't

11 show you, correct? "Question: Do you agree with me it

12 was unacceptable at Hodell-Natco?"

13 THE COURT: Are you going to read the whole

14 transcript?

13:57:01 15 MR. MILLER: Objection.

16 BY MR. LAMBERT:

17 Q. I asked you on line 16, "Do you agree with me that

18 the performance of Business One was unacceptable at

19 Hodell-Natco?" And what was your answer?

13:57:09 20 A. I do.

21 Q. And do you agree with me that Hodell-Natco had

22 every right to abandon Business One and move to a

23 different software package? What your answer?

24 A. Sure.

13:57:19 25 Q. Mr. Miller asked you about Exhibit 130. Kim, can

1 you pull up Exhibit 130?

2 It might be Defendant's Exhibit 130. I'm  
3 not sure.

4 This was a document, the Gada Shamia  
13:57:43 5 document?

6 A. Yes.

7 Q. Discussing the Sweet Spot.

8 A. Yes.

9 Q. Do you know when you had this in your possession?

13:57:49 10 A. I don't.

11 Q. But we see that at least in 2005, SAP knew this  
12 information. Correct?

13 A. Correct.

14 Q. And this was before Hodell signed the license  
13:58:02 15 agreement?

16 A. Correct.

17 Q. And SAP in this document is acknowledging that the  
18 Sweet Spot for Business One is 10 to 100 employees.  
19 Correct?

13:58:10 20 A. Correct.

21 Q. So we know that SAP knew in 2005 that Hodell was  
22 outside the Business One Sweet Spot. Correct?

23 A. Yes.

24 Q. And do you consider 10 to 100 employees to be the  
13:58:22 25 same as 10 to 100 users?

1 A. Yes.

2 Q. And how many users did Hodell go live with in  
3 March, 2007?

4 A. 80, plus another 40, so 120.

13:58:33 5 Q. 120 users. And again, just so I'm clear, this  
6 document is a 2005 SAP document. Correct?

7 A. Correct.

8 Q. Kim, can you pull up Defendant's Exhibit 123?

9 This is the field kickoff meeting notes you  
13:59:01 10 were asked about. Correct?

11 A. Yes.

12 Q. Do you remember being asked about some notes you  
13 took, or someone took where they -- were they your  
14 notes? I forget.

13:59:13 15 A. Were they mine? Did I make these?

16 Q. Yes.

17 A. No, these were made by somebody that worked for me.

18 Q. Can you flip to the page where it has -- that Mr.  
19 Miller was asking about?

13:59:24 20 There we go.

21 A. Okay.

22 Q. The section, "look at this." Do you see that?

23 A. Yes.

24 Q. And he asked you, you knew in, at least at the time  
13:59:42 25 these notes were taken, that Business One was not

1 appropriate for Hodell?

2 A. Yes. He asked me that.

3 MR. MILLER: Your Honor, can you read that  
4 back? I object, Your Honor. I don't think that's the  
14:00:02 5 question.

6 MR. LAMBERT: I'll restate it.

7 BY MR. LAMBERT:

8 Q. Do you remember being asked about these notes,  
9 correct?

14:00:12 10 A. I do.

11 Q. And whether you saw that someone had said at a  
12 field kickoff meeting that Business One was appropriate  
13 for 50 concurrent users. Do you recall that?

14 A. I do.

14:00:22 15 Q. And you acknowledge you did not communicate that to  
16 Hodell. Correct?

17 A. I did not.

18 Q. And why isn't that?

19 A. Well, because I called SAP, Dan Kraus, Jeff Ashley,  
14:00:42 20 because these are concerning numbers, and I told you what  
21 they mentioned, they said there is just -- don't worry  
22 about it, there is no theoretical maximum, continue with  
23 the program.

24 Q. The Hodell program?

14:00:54 25 A. The Hodell program.



1 Q. And did an order for SAP licenses ultimately get  
2 placed? An order for SAP ultimately got placed, correct?

3 A. Yes.

4 Q. And it was for 80 and 40, correct?

14:01:12 5 A. Yes.

6 Q. And well outside the 50 concurrent users in these  
7 notes. Correct?

8 A. Correct.

9 MR. MILLER: Objection, Your Honor.

14:01:18 10 THE COURT: Overruled.

11 MR. MILLER: 50 concurrent is different  
12 than 80 plus 40.

13 BY MR. LAMBERT:

14 Q. Mr. Miller asked you a line of questioning about  
14:01:30 15 whether you communicated this to Hodell, and again you  
16 said you didn't. Correct?

17 A. I said I did?

18 Q. Didn't?

19 A. Yes.

14:01:36 20 Q. Did not.

21 A. Oh, wait a minute. I'm sorry. I thought you said  
22 SAP. No. I did not communicate that to Hodell.

23 Q. And at the time you -- LSi was an authorized SAP  
24 channel partner. Correct?

14:01:51 25 A. Correct.

1 MR. LAMBERT: Nothing further, Your Honor.

2 THE COURT: Thank you. Any recross?

3 MR. MILLER: Yes, Your Honor. I expect to  
4 be brief.

14:02:03

5 RECROSS-EXAMINATION

6 BY MR. MILLER:

7 Q. Can you call up Exhibit 618, please?

8 Mr. Lowery, we have on the screen Exhibit  
9 618, do you see that there?

14:02:50

10 A. I do.

11 Q. That's the exhibit Mr. Lambert just reviewed with  
12 you a couple moments ago?

13 A. Okay.

14 Q. Correct?

14:02:56

15 A. Correct. Well, yes.

16 Q. SAP Business One Whitepaper.

17 A. Yes.

18 Q. Okay. It is from August of 2002.

19 A. Yes.

14:03:03

20 Q. Okay. Can you please, Bob, go to page seven?

21 Down at the bottom, 2.3, can you highlight  
22 that, please?

23 Actually, it would be the next page of that  
24 that has 2.8 on it. I think that is 2.8. The print is  
14:03:31 25 so difficult to read.

1 Can you scroll down, please, and try to get  
2 a photograph of 2.8 so we can all see it? Thank you.

3 Actually -- right. 2.8. This is the  
4 phrase that you reviewed when Mr. Lambert was asking you  
14:03:46 5 questions?

6 A. It is.

7 Q. And the first sentence says to secure critical  
8 business and system processes, a robust MS-SQL 2000  
9 database is used. Do you see that sentence there?

14:03:58 10 A. Yes.

11 Q. MS stands for Microsoft?

12 A. It does.

13 Q. It is a Microsoft product?

14 A. Yes.

14:04:05 15 Q. A piece of Microsoft software?

16 A. Yes.

17 Q. Thank you. Next question about fresh and new. We  
18 talked about whether the product, B1, was fresh and new,  
19 right?

14:04:18 20 A. We did.

21 Q. And the point, isn't it true, that B1 existed in  
22 other parts of the world before it was offered for sale  
23 in the United States?

24 A. It did.

14:04:29 25 Q. So in the 2003 and 2004 time frame, B1, to the

1 extent it was fresh and new, was fresh and new in the  
2 United States. Right?

3 A. Yes.

4 Q. Okay.

14:04:41 5 MR. MILLER: No further questions, Your  
6 Honor.

7 THE COURT: Thank you, Mr. Lowery. You are  
8 excused. Watch your step.

9 THE WITNESS: I'm done?

14:04:47 10 THE COURT: You are finished.

11 THE WITNESS: Thank you to the jury. That  
12 had to be tough sledding. Am I free to go?

13 THE COURT: Do whatever you please.

14 MS. LUARDE: Your Honor, at this time, we  
14:05:06 15 would like to call Udi Ziv. He is actually one of our  
16 witnesses whose video clips we intend to play.

17 MR. STAR: Your Honor, can we approach? We  
18 discussed the order of witnesses and this is out of the  
19 order we were going to do this.

14:05:25 20 MR. MILLER: We flew a witness in from out  
21 of town to go in the sequence the witnesses were told to  
22 us they would come in. According to the sequence, the  
23 next witness is Paul Killingsworth that has been waiting  
24 all morning in the conference room.

14:05:39 25 MS. LUARDE: Your Honor, we made a last

1 minute decision. We were told that Mr. Killingsworth was  
2 here for the duration. We were under the impression it  
3 would be okay. The video selection is short. The timing  
4 seems appropriate to put him in. It also lays the  
14:05:53 5 foundation for the testimony --

6 THE COURT: Did you ask that  
7 Mr. Killingsworth be brought here?

8 MS. LUARDE: We did. And if we need to go  
9 forward with Mr. Killingsworth, we will.

14:06:07 10 THE COURT: We should do that. He has been  
11 here all day.

12 MR. STAR: So you want him called?

13 MS. LUARDE: Yes. We call  
14 Mr. Killingsworth.

14:06:31 15 (The witness is sworn.)

16 THE COURT: Please tell us your full name  
17 and spell your last name.

18 THE WITNESS: My name is Paul Anthony  
19 Killingsworth. It is spelled K-i-l-l-i-n-g-s-w-o-r-t-h.

14:07:35 20 THE COURT: Thank you.

21 PAUL KILLINGSWORTH, being first duly sworn,  
22 was examined and testified as follows:

23 DIRECT EXAMINATION OF PAUL KILLINGWORTH

24 BY MR. CARNEY:

14:07:38 25 Q. Hello, Mr. Killingsworth. My name is Chris Carney

1 and I'm a lawyer for Hodel-Natco. We've never met  
2 before, have we?

3 A. No, we have not.

4 Q. Who is your current employer?

14:07:50 5 A. SAP America.

6 Q. And how long have you worked for SAP?

7 A. I have been there since November of 2006.

8 Q. And when you were hired at SAP, you were hired to  
9 be an escalation manager. Correct?

14:08:06 10 A. That's correct.

11 Q. And that would have been an escalation manager for  
12 the Business One group. Correct?

13 A. Correct.

14 Q. And are you still an escalation manager for the  
14:08:14 15 Business One group?

16 A. No, sir, I am not.

17 Q. Okay. How long were you an escalation manager for  
18 the Business One group?

19 A. In approximately 2009, I believe, I was promoted to  
14:08:24 20 senior director for customer relations and solution  
21 experts for Business One North America.

22 Q. Well, congratulations. Now, in your role as an  
23 escalation manager, do you recall testifying in your --  
24 you were deposed in this case, correct?

14:08:46 25 A. Yes, sir.

1 Q. And you were asked a series of questions under  
2 oath. Correct?

3 A. That is correct.

4 Q. Okay. Do you recall your testimony back in your  
14:08:56 5 deposition that in your role as an escalation manager,  
6 you dealt with customer complaint situations that had  
7 escalated to the point that they were being -- they  
8 weren't being appropriately addressed through usual  
9 channels or were urgent in nature.

14:09:13 10 Is that an accurate description of your  
11 role as an escalation manager?

12 A. It sounds accurate to me, yes.

13 Q. Okay. Now, when you were deposed in this case, you  
14 were identified by SAP as its corporate designee, as the  
14:09:37 15 person most knowledgeable on a number of topics.

16 Correct?

17 A. Yes, sir.

18 Q. Okay. Now and one of those topics was how SAP was  
19 marketed -- SAP marketed and sold Business One.

14:09:51 20 Correct?

21 A. That is correct.

22 Q. And it's fair to say that SAP relied upon its  
23 channel partners to make those sales because it didn't  
24 have a direct sales force. Isn't that correct?

14:10:04 25 A. For Business One, yes, sir, that is correct.

1 Q. And that's -- and I thank you for clarifying.

2 We'll be talking about Business One today, okay?

3 A. Okay.

4 Q. Thank you. And you recall testifying in your

14:10:22 5 deposition that channel partners were responsible for

6 qualifying the sales of Business One customers and were

7 managed by an SAP regional channel manager who reported

8 to an SAP sales manager. Is that correct?

9 A. That is correct.

14:10:37 10 Q. Now, at the time of the Hodell sale, Jeff Ashley

11 was the Business One sales manager. Correct?

12 A. I believe so, yes.

13 Q. You testified to that effect on Page 52 of your

14 deposition. Do we need to pull it out?

14:10:56 15 A. No, sir. That will be fine.

16 Q. And Mr. Ashley reported to Dan Kraus. Correct?

17 A. That is correct.

18 Q. Do you recall what Dan Kraus' title was at the

19 time?

14:11:06 20 A. Not precisely, but it was something -- it was vice

21 president of Business One, something along that line.

22 Q. Now, back in the 2006 -- of course after you

23 became employed by SAP, end of 2007 time frame, you

24 became familiar with a company by the name of LSi.

14:11:29 25 Correct?



1 A. Yes, sir, that's correct.

2 Q. And LSi was a channel partner of SAP. Correct?

3 A. That is correct.

4 Q. And you recall testifying in your deposition that

14:11:43 5 SAP publicly represented this fact, the fact -- excuse  
6 me.

7 You testified in your deposition that SAP  
8 publicly represented this fact to potential customers?

9 A. I'm sorry. I'm not understanding your question.

14:11:58 10 Can you say that again?

11 Q. That was a poor question. I apologize.

12 SAP publicly represented to potential  
13 customers that Business One sales were made through their  
14 channel partners. Correct?

14:12:13 15 A. That is correct.

16 Q. And channel partners were encouraged to use the SAP  
17 logos on their marketing literature and to leverage the  
18 SAP brand. Correct?

19 A. Sure, yes.

14:12:33 20 Q. Okay. And it is true that to become a channel  
21 partner of SAP, potential channel partner had to have  
22 demonstrated sales success and quality work product.  
23 Correct?

24 A. In general, yes, that was the criteria that the  
14:12:56 25 recruiters would use to select channel partners, yes.

1 Q. And that's what you testified to at pages 65 and 66  
2 of Volume 1 of your deposition?

3 A. Okay.

4 Q. Do we need to pull it out or do you accept that?

14:13:09 5 A. No, sir. I'm fine. Thank you.

6 Q. And in fact, SAP emphasized the experience and  
7 qualifications of its channel partners in its marketing  
8 literature. Correct?

9 A. If you can show me some documentation to that  
14:13:28 10 effect, I might be able to validate that, but I don't  
11 know any marketing material specifically that says that.

12 Q. Could you pull up Exhibits -- excuse me, Exhibit  
13 314, please?

14 May I approach? It may be easier to you,  
14:14:07 15 the exhibits that I would potentially talk to you are in  
16 this binder, but we can pull them up on the screen as  
17 well.

18 A. Thank you. It is hard to read on the screen.

19 Q. Tell me when you are ready. Oh. You are doing  
14:14:23 20 like I am?

21 A. Just this year I had to start wearing reading  
22 glasses, and I'm having a hard time getting used to that.  
23 Here we go.

24 Q. It's okay. Take your time. I'm going to ask you  
14:14:32 25 some questions about Exhibit 314.

1 A. Okay. I'm ready.

2 Q. If you leaf through the document, before I start  
3 asking you questions, you can see it is an eight-page  
4 document. Correct?

14:14:48 5 A. That is correct.

6 Q. And, in fact, if you just go to the fifth page of  
7 the document -- and when I say the fifth page, why don't  
8 you go to -- it is 314.5.

9 A. I have it.

14:15:13 10 Q. That is actually a second document. These were two  
11 pieces of marketing literature that were combined into  
12 one document. I was just going to ask you a couple  
13 questions about both. Okay?

14 A. Okay.

14:15:26 15 Q. Turning back to the first document -- or excuse  
16 me, the first page of the document, the title of that  
17 document is "SAP Business One brief." Correct?

18 A. That is correct.

19 Q. And it's fair to say this is a piece of marketing  
14:15:48 20 literature, correct?

21 A. That is correct.

22 Q. Okay. Could you please turn to the fourth --  
23 excuse me, the third page of the document?

24 A. I'm there.

14:16:05 25 Q. Okay. I'm going to -- direct your attention to

1 the last bullet point in the first column of the  
2 document. Do you see that?

3 A. I do.

4 Q. And can you please read that?

14:16:22 5 A. Sure. "Unmatched expertise—because SAP Business  
6 One is delivered through a network of highly qualified  
7 channel partners who understand the specific challenges  
8 facing small and mid size businesses customers receive  
9 world class service and support."

14:16:40 10 Q. So then this is a piece of marketing literature  
11 that emphasized the experience and qualifications of  
12 channel partners. Correct?

13 A. That is correct, yes.

14 Q. And since we're on the document, why don't we turn  
14:16:52 15 to the second piece of marketing literature in this  
16 exhibit.

17 A. Can you give me a page?

18 Q. Page 7.

19 A. 314.7? Is that what you are referring to?

14:17:15 20 Q. Yes. Thank you.

21 A. I'm there.

22 Q. And the second paragraph in the second column.

23 A. I see it.

24 Q. This paragraph is substantially identical to the  
14:17:28 25 paragraph you just read. Correct?

1 A. Yes. Substantially the same.

2 Q. And so this is another piece of marketing  
3 literature that SAP used to emphasize the experience and  
4 qualifications of its channel partners. Correct?

14:17:46 5 A. That is correct.

6 Q. Okay. Can you turn to Exhibit 129, please?

7 A. I'm there.

8 Q. And I would ask you to turn to Exhibit 129, Page 2.

9 A. I don't appear to have 129.2. I have 129.3, table  
14:18:30 10 of contents. But I can see it on the screen. That's  
11 fine.

12 Q. Thank you. And that is an SAP Business One 2006  
13 document. Correct?

14 A. That is correct. March, 2006.

14:18:45 15 Q. And it's a statement of direction for SAP Business  
16 One?

17 A. That is correct.

18 Q. And it is a confidential document to SAP, correct?

19 A. Yes. It says right there, "confidential for SAP  
14:19:04 20 and Business One partners."

21 Q. Thank you. Bear with me. I'm just checking my  
22 notes.

23 Kim, could you please turn to Page 7 of the  
24 document?

14:19:56 25 I'm going to direct your attention to the

1 second paragraph, the first column.

2 A. I see it.

3 Q. Could you please read the first sentence?

4 A. Sure. "Please note. As a rule, this document

14:20:19 5 should not be shared with customers."

6 Q. Thank you. Let's turn to the next page, 129.8.

7 A. I'm there.

8 Q. I would like to direct your attention to the second  
9 paragraph in the first column.

14:20:46 10 A. I'm there.

11 Q. The first sentence states that "While SAP Business  
12 One has many satisfied larger customers, it's ideally  
13 suited for companies with 10 to 100 employees." Do you  
14 see that?

14:21:08 15 A. Yes, I do.

16 Q. In 2006 when this document was published, the  
17 target market for Business One customers was customers  
18 with 10 to 100 employees. Correct?

19 A. This is saying here that it is just ideally suited.  
14:21:26 20 I wouldn't necessarily say that's where it was marketed.

21 Q. Okay. Let's turn to -- let's go to the last  
22 sentence of that paragraph.

23 A. Okay.

24 Q. What does it say?

14:21:40 25 A. SAP Business One is optimized for performance with

1 up to 50 concurrent users.

2 Q. Okay. Thank you.

3 A. Sure.

4 Q. Now, let's turn to the same page, the second  
14:21:56 5 column, last paragraph.

6 Can you read the last paragraph, and end  
7 after the first bullet point?

8 A. Sure. "Our experience shows us that SAP Business  
9 One implementations are significantly more successful  
14:22:16 10 when we target prospects that fit the profile we used  
11 while designing the product as follows: 10 to 100  
12 employees approximately half of them using SAP Business  
13 One concurrently."

14 Q. Thank you. Now, in order for a channel partner to  
14:22:39 15 sell Business One, you would agree with me that a channel  
16 partner would have to make representations about the  
17 capabilities of the product, wouldn't you? It would  
18 stand to reason, right?

19 A. Well, what I would suggest is that they can  
14:22:54 20 demonstrate what the product is able to do.

21 Q. So it's your testimony that a channel partner that  
22 sells Business One cannot make any representations  
23 about --

24 A. Yes, sir, that is my testimony. They may not make  
14:23:14 25 a representation. Correct.

1 Q. So when they go to a trade show, what do they do?

2 A. They can show the software, they can provide  
3 marketing documents that we provided them. They can  
4 demonstrate it.

14:23:27 5 Q. And how many years of sales experience do you have?

6 A. Well, prior to joining SAP, I was a reseller  
7 myself, and I spent 12 years as a reseller.

8 During those 12 years, I did pretty much  
9 everything, from consulting to sales to project  
14:23:46 10 management and eventually owned the company, so I have  
11 quite a bit of experience.

12 Q. Okay. Thank you. Now, you're aware of the fact  
13 that in July of 2004, LSi approached SAP about two 150  
14 SAP Business One deals with one of them being  
14:24:06 15 Hodel-Natco, correct?

16 A. Well, I wasn't at SAP at the time but I became  
17 aware of that later yes.

18 Q. And you testified to that effect at your deposition  
19 at Pages 219 and 220, Volume 1?

14:24:21 20 A. Okay.

21 Q. Okay? We can pull it out --

22 MR. KELLEHER: Objection.

23 THE COURT: Just ask him questions.

24 BY MR. CARNEY:

14:24:37 25 Q. You would agree with me that a 150-user license



1 deal would have raised some eyebrows and gotten the  
2 attention of SAP because it was a big sale in terms of  
3 dollar amount and number of users, correct?

14:24:57 4 A. Generally speaking when there was a big sale like  
5 this, what we consider a large sale, when we became aware  
6 of it, it was of interest, sure.

7 Q. So let me ask the question again. I'm sorry. I  
8 thought it called for a yes or no answer. You're aware  
9 of the fact that -- you would agree that a 150-user  
14:25:17 10 license deal would have raised some eyebrows and gotten  
11 the attention of SAP because it was a big sale in terms  
12 of dollar amount and number of users, correct? Yes or  
13 no. And if you can't answer it yes or no, then just tell  
14 me that.

14:25:31 15 A. I'm uncomfortable with the way you phrased that  
16 question to answer it yes or no.

17 MR. CARNEY: May I approach, Your Honor?

18 THE COURT: Sure.

19 BY MR. CARNEY:

14:26:48 20 Q. Mr. Killingsworth, I just handed you Volume 1 of  
21 your deposition in this case as the company designee.

22 A. Yes.

23 Q. And that deposition was taken on July 13, 2012.  
24 Correct?

14:27:05 25 A. That's correct.

1 Q. And you were represented by counsel?

2 A. That is correct.

3 Q. And you gave testimony in front of a court  
4 reporter?

14:27:15 5 A. That is correct.

6 Q. And you were sworn just like you were today to tell  
7 the truth. Correct?

8 A. That is correct.

9 Q. And you were asked a series of questions, starting  
14:27:27 10 on page, the bottom of Page 219, Line 24.

11 A. I'm there.

12 Q. And I'll read the question. And I'll ask you to  
13 read the answers, okay?

14 A. Okay.

14:27:43 15 Q. "Okay. But we can agree that at that point, Dan  
16 Lowery was communicating to Dan Kraus that he was  
17 discussing a potential sale of 150-user licenses to  
18 Hodell." Is that fair?

19 A. "That I can agree to, he was discussing a potential  
14:28:00 20 sale."

21 Q. "Question. At the time that this e-mail was sent,  
22 would a 150-user license deal have raised a red flag at  
23 SAP"?

24 A. "It would raise a lot of eyebrows. I wouldn't say  
14:28:17 25 a red flag. I would say it would get attention."

1 Q. "And why is that?"

2 A. "That is a big sale."

3 Q. "In terms of dollar amount and in terms of users.  
4 Is that correct?"

14:28:30 5 A. "Yes, yes."

6 Q. Now, the document that you were being questioned  
7 about was Exhibit 71, and I'll ask you to turn to  
8 Page 217 of your -- excuse me.

9 A. I assume I can close this?

14:28:50 10 Q. No. I'm going to ask you to turn to 216 of your  
11 deposition, just so you can confirm that. And Kim, can  
12 you pull up Exhibit 71, please?

13 Excuse me. I apologize. I may have the  
14 wrong exhibit.

14:29:50 15 MR. CARNEY: May I confer?

16 THE COURT: Sure.

17 (Discussion off the record.)

18 MR. CARNEY: I apologize.

19 BY MR. CARNEY:

14:30:49 20 Q. Kim, is there any way to blow up the last,  
21 Paragraph 4 -- excuse me, Page 4? Thank you.

22 Now, this is Exhibit 71 and you testified  
23 to it at your deposition, correct?

24 A. I don't recall if I read that document, to be  
14:31:11 25 honest with you.

1 Q. Well, let's take a look at Page 216 of your  
2 deposition?

3 A. Okay. All right.

4 THE COURT: Why don't you just ask him  
14:31:19 5 questions that you want him to answer. Don't be talking  
6 about the deposition all the time.

7 MR. CARNEY: Thank you, Your Honor.

8 BY MR. CARNEY:

9 Q. Kim, could you blow up the fourth paragraph,  
14:31:31 10 beginning with "Dale and I"?

11 "Dale and I have been talking about two  
12 large close prospects who want to write our equipment  
13 rental and fastener functionality to SAP. One is  
14 currently installed on FACTS and the other is waiting for  
14:31:53 15 us to propose the cost and timeline for ER on SAP  
16 Business One. They are both 150-user deals which would  
17 give us two verticals for the SAP product. Personally, I  
18 feel verticals are the quickest route to continuing SBO  
19 sales."

14:32:13 20 This was part of an e-mail to Dan Kraus,  
21 and you testified to it, about it at your deposition.  
22 Correct?

23 MR. KELLEHER: Objection.

24 THE COURT: Ask him if recognizes the  
14:32:35 25 document.

1 A. No, sir, I don't recognize the document.

2 Q. But you stand by your testimony that a --

3 MR. KELLEHER: Objection, Your Honor.

4 THE COURT: It's the same thing.

14:32:47 5 MR. CARNEY: I'm wrapping up the line of  
6 questioning.

7 THE COURT: You may have been asking  
8 improper questions at the deposition. I don't know. The  
9 issue before is the testimony here.

14:32:54 10 MR. CARNEY: I'll move on.

11 MR. KELLEHER: We would move to strike --

12 THE COURT: Stop.

13 Q. In 2004, in July of 2004, would a 150-user sale be  
14 outside the Sweet Spot for SAP Business One?

14:33:17 15 A. Yes. It could be considered outside the Sweet  
16 Spot, yes.

17 Q. Thank you.

18 A. It doesn't necessarily mean it is a bad sale.

19 Q. Thank you. Your answer -- I appreciate it, but you  
14:33:35 20 answered the question.

21 Please turn to 435. Exhibit 435.

22 Can you identify this document?

23 A. I can. It is a document that describes the  
24 opportunity qualification tool, otherwise known as the  
14:34:04 25 OQT.

1 Q. And its date of publication is the 21st of  
2 February, 2006?

3 A. That is correct.

4 Q. And this, too, is an SAP confidential document.  
14:34:21 5 Correct?

6 A. That is correct.

7 Q. Please turn to Page 2 of the document.

8 A. I'm there.

9 Q. Now, this is a document that helps channel partners  
14:34:41 10 qualify a sale. Correct?

11 A. That is correct.

12 Q. And it sets forth criteria that they should  
13 consider in terms of qualifying a sale. Correct?

14 A. That's correct.

14:34:52 15 Q. Now, in the middle of page two, number two, it says  
16 "the number of employees at a prospect." Do you see  
17 that?

18 A. Yes, sir, I do.

19 Q. And in the answers, it states 150 plus employees is  
14:35:12 20 no fit. Correct?

21 A. The text there says that, but if you read the  
22 paragraph just below that, it explains it further.

23 Q. Thank you. 150 plus employees states no fit. Yes  
24 or no?

14:35:27 25 A. I'm uncomfortable -- it says that on the paper --

1 Q. Thank you.

2 A. But that is not all the information. There is  
3 additional information here that you have to take into  
4 consideration.

14:35:36 5 Q. Thank you. And your counsel can clear that up?

6 A. Thank you.

7 Q. Number 3. Number of SAP Business One users  
8 planned. That's on page 3 of the same document.

9 A. I see it.

14:35:51 10 Q. And under the column answers, 76 plus users, no  
11 fit. Correct? I read that correctly, didn't I?

12 A. You read it correctly.

13 Q. Thank you. Can you turn to Exhibit 119.

14 A. I'm there.

14:36:31 15 Q. Let's start with page two of that, which is the  
16 cover page. Correct?

17 A. Yes, sir. According to this.

18 Q. And can you identify the document?

19 A. It's described as a sizing transaction volumes.

14:36:49 20 Q. And it relates to SAP Business One. Correct?

21 A. That is correct, yes.

22 Q. Okay. Can you please turn to page four of the  
23 document?

24 A. 119.4, I presume?

14:37:06 25 Q. Yes. Thank you.

1 A. Yes, I'm there.

2 Q. And the title on the top of that page is "History  
3 of Business One Deal Sizes." Do you see that?

4 A. I do.

14:37:15 5 Q. And in the first line after it, it states "average  
6 deal size," number of users. Do you see that?

7 A. It does say the average, yes.

8 Q. And the average was 15, correct?

9 A. That is correct.

14:37:27 10 Q. Okay. Now, let's turn to Page 24 of the same  
11 document.

12 A. I'm sorry. Did you say 24?

13 Q. I did.

14 A. Okay. I'm there.

14:37:43 15 Q. And the title of this page is, "When might an  
16 opportunity be too large for Business One?" Correct?

17 A. I see that.

18 Q. And it goes on to say, right underneath the title,  
19 "here are the red flags that the experts suggest to me  
14:38:07 20 are reasons for fully reviewing the fit carefully,"

21 correct?

22 A. Mostly correct. I think you added the word "fully"  
23 but for reviewing the fit carefully. Correct.

24 Q. Sorry about that.

14:38:22 25 A. No problem.



1 Q. And under the -- under the heading "size," the  
2 last line says "will the number of users exceed 30"?  
3 Correct?

4 A. Yes, sir.

14:38:34 5 Q. Do you know who Udi Ziv is?

6 A. I know the name. I don't know him personally.

7 Q. He was an employee of SAP?

8 A. Yes. Correct. SAP Israel.

9 Q. And he was involved in the development of Business  
14:39:00 10 One?

11 A. I know he worked in the development group, and I  
12 believe he also was with the company that SAP acquired  
13 when we acquired Business One, but that's all I know, I'm  
14 afraid.

14:39:11 15 Q. Okay. You don't know if he -- is it your  
16 testimony that you're unaware of whether or not he had a  
17 leadership role --

18 A. I do believe he had a leadership role, yes.

19 Q. With SAP Business One development?

14:39:30 20 A. Correct.

21 Q. Thank you. Can you turn to Exhibit 69?

22 A. I'm there.

23 Q. And this is a five-page e-mail exchange, and we're  
24 going to go to page 5. We'll start -- well, actually,  
14:39:51 25 page four, because page five is just the end of a

1 signature line.

2 A. Okay.

3 Q. The first e-mail in this series is an e-mail sent  
4 from Dan Lowery to Udi Ziv on April 11, 2007. Correct?

14:40:12 5 A. That is correct.

6 Q. And you are one of the individuals that was copied  
7 on this document -- or on this e-mail. Correct?

8 A. That is correct.

9 Q. The other individuals were Dan Kraus, Michael  
14:40:26 10 Sotnick, and Bill McDermott, who I believe at the time  
11 was the CEO of SAP America?

12 A. At the time, yes. He had a high leadership  
13 position, yes.

14 Q. Okay. What's he doing now?

14:40:40 15 A. He is now the CEO of SAP.

16 Q. SAP America?

17 A. Well, I want to make sure I'm accurate. I believe  
18 it is SAP AG. I'm sorry. I'm not totally clear on his  
19 official title.

14:40:54 20 Q. Can you read the first three bullet points  
21 beginning with "we are"?

22 A. "We are an SAP Business One reseller in St. Louis."

23 Next bullet point, "We have installed a  
24 120-user B1 deal at Hodell-Natco in Cleveland with an  
14:41:19 25 add-on we develop called In-Flight Enterprise.

1 "And we went live March 1, 2007 and are  
2 experiencing extreme system performance issues. Large  
3 customer orders take two hours to enter into the system,  
4 et cetera."

14:41:32 5 Q. So he identifies Hodell as a 120-user B1 company.  
6 Correct?

7 A. That is correct.

8 Q. And turning to page three of the document, I want  
9 to direct your attention to an internal e-mail from Udi  
14:42:05 10 Ziv to Dan Kraus on Thursday, April 12, 2007. Do you see  
11 that?

12 A. I do.

13 Q. And again, Mr. Killingsworth, you were copied on  
14 this document?

14:42:19 15 A. I was.

16 Q. And could you please read the first sentence of the  
17 e-mail?

18 A. He says, "I honestly do not know what to tell you.  
19 Someone had sold to the wrong customer, which is way  
14:42:32 20 above any sane B1 Sweet Spot, 120 users, three  
21 exclamation points, and obviously they are experiencing  
22 severe performance issues."

23 Q. Okay. Then I would like to go to the -- to the  
24 last paragraph of the e-mail and I would ask you to read  
14:42:51 25 the two bullet points that are there.

1 A. "Bottom line, I recommend that we go for a  
2 reimbursement and we debrief the whole process that got  
3 us to having this customer in the first place."

4 Q. Turn to Exhibit 157, please.

14:43:17 5 A. I think I'm there.

6 Q. This is another document produced by SAP in  
7 discovery. It's a two page e-mail exchange. Correct?

8 A. Correct.

9 Q. Now, I want to direct your attention to an April  
14:43:38 10 16, 2007 e-mail from a gentleman by the name of Ralf  
11 Mehnart-Meland. Did I say that correctly?

12 A. We call him RMM for short.

13 Q. I'll call him Ralf Mehnart-Meland. He sent an  
14 e-mail to Michael Sotnick and Dan Kraus, correct?

14:44:04 15 A. Correct.

16 Q. And I note that you also were copied on the e-mail.  
17 Correct?

18 A. That is correct.

19 Q. And Jeff Ashley was copied on the e-mail, Edward  
14:44:13 20 Neveux, and Manfred Weis?

21 A. Correct.

22 Q. I take it Manfred Weis is another SAP employee?

23 A. He is, yes.

24 Q. I would ask you to turn to the second page of the  
14:44:30 25 document. I would like to direct your attention -- oh,

1       excuse me. Before we do that, what's the subject of this  
2       e-mail?

3       A.       The subject SAP-BO at Hodell-Natco. Is that what  
4       you are referring to.

14:44:56 5       Q.       The subject of the e-mail we were just discussing,  
6       subject, forward, Dan Lowery, performance issues at  
7       Hodell-Natco?

8       A.       I'm sure it is on there. There it is. I see it.  
9       Yes.

14:45:06 10       Q.       Now, I would like to have you turn to the second  
11       page of the exhibit. And I would ask you to go to the  
12       summary of Maynard, his summary of the whole situation as  
13       of April 16, 2007.

14       A.       I see that.

14:45:29 15       Q.       Can you read the summary, please?

16       A.       He writes "Hodell has just too much data. SAP  
17       Business One cannot handle it and there is no fix in  
18       sight. I believe we need to find a way to get the  
19       customer off SAP Business One."

14:45:43 20       Q.       And at the time, Mr. Maynard was the director of  
21       business development for SAP Business One, correct?

22       A.       That is correct.

23       Q.       Now, let's turn to Exhibit 162.

24       A.       I'm there.

14:46:11 25       Q.       This is another internal e-mail of SAP, correct?

1 A. Yes, it is.

2 Q. It's a four-page document.

3 A. I'm counting six for some reason.

4 Q. Yes. And I see that. And I put this binder  
14:46:43 5 together quickly. But you will see that the last two  
6 pages are, again, Exhibit 157. Do you see that?

7 A. I do.

8 Q. Okay. So are we on the same page here, that  
9 Exhibit 162 is a four-page document?

14:46:57 10 A. Well, the bottom of mine is cut off. What I'm  
11 saying is Exhibit Number 157 in the middle of the page.  
12 Oh, I see up here. Okay. Hang on.

13 Q. If you could just turn to the first page.

14 A. Oh, one more. I'm there now. Yes.

14:47:18 15 Q. Okay. And I'm only going to ask you about the top  
16 e-mail on the first page of this document.

17 A. Okay. That's fine.

18 Q. Okay. This is an e-mail from Edward Neveux to  
19 Volker Anders and Torsten Budeshemim?

14:47:45 20 A. That's correct.

21 Q. I notice you are copied on this e-mail with another  
22 individual by the name of --

23 A. You're not going to try it.

24 Q. Gianluigi Bagnoli?

14:48:08 25 A. Close. You have to say it with an Italian accent,

1       though.

2       Q.     I cannot.     This is dated June 18, 2007.     Correct?

3       A.     Yes.

4       Q.     And the subject of the e-mail is SAP Business One

14:48:19 5       at Hodell-Natco, correct?

6       A.     That is correct.

7       Q.     I'm going to direct your attention to the second

8       sentence of Mr. Nuveaux's e-mail, beginning with the

9       issue, and I would ask that you read it to the jury.

14:48:36 10      A.     Just that one sentence?

11      Q.     Yes.

12      A.     "The issue with this particular customer is that

13      they started with a dataset that was well outside, slash,

14      greater than the, quote, high end, unquote, dataset

14:48:48 15      tested for Business One 2005 SP 01 in Israel."

16      Q.     Now, Mr. Neveux at the time was a solution

17      architect for Business One, correct?

18      A.     That is correct.

19      Q.     So he is a technical guy.     Right?

14:49:03 20      A.     That is very correct.

21      Q.     Now I would like you to move on to the fourth

22      sentence, and I would ask you to read to the jury the

23      fourth sentence of Mr. Nuveaux's e-mail, starting with

24      the word "performance"?

14:49:24 25      A.     "Performance issues exist in Business One by itself

1 as stated by development with this magnitude of data. No  
2 add-ons running."

3 Q. And add-ons are things like -- you have heard of  
4 Radio Beacon, right?

14:49:39 5 A. I have.

6 Q. And that's an add-on, correct?

7 A. Correct.

8 Q. And you have heard of In-Flight Enterprises,  
9 correct?

14:49:45 10 A. That is correct.

11 Q. That's an add-on, right?

12 A. Correct.

13 Q. Okay. Now, can you turn to Exhibit 437?

14 A. I'm there.

14:50:13 15 Q. This is an e-mail you sent to Kevin Reidl and Otto  
16 Reidl at Hodell-Natco, and it is dated May 14, 2007, at  
17 7:25 p.m. correct?

18 A. Correct.

19 Q. Why don't you read the second paragraph of your  
14:50:36 20 e-mail.

21 A. "We have also been working with Dirk and the  
22 development team to find and address the course of the  
23 issues. We believe that the results of these efforts  
24 will be substantially realized in the PL 23 release.

14:50:50 25 Many hours of research and development have culminated in



1 the changes that will be implemented in this patch  
2 level."

3 Q. Now I'd like you to go to the next paragraph and  
4 read for the jury your -- the second-last sentence of  
14:51:11 5 your e-mail in that paragraph, starting with  
6 functionally.

7 A. I'm sorry? Functionally?

8 "Functionally, the product with the  
9 additions of In-Flight and Radio Beacon is an outstanding  
14:51:24 10 business solution for you and your company. The issue  
11 we're faced today is solely the performance problem we're  
12 experiencing at your installation."

13 Q. Thank you. Please turn to the next document. That  
14 should be 263 in your exhibit binder.

14:51:51 15 A. What number did you say?

16 Q. I'm sorry. 263.

17 A. I'm there.

18 Q. Okay. This also is a -- another e-mail chain  
19 internal to -- internal to SAP, correct?

14:52:12 20 A. That is correct.

21 Q. Okay. And I want to focus on the e-mail in the  
22 middle of the first page of Exhibit 263. Okay?

23 A. Okay.

24 Q. The e-mail was from a gentleman, and I'm just  
14:52:28 25 assuming it was a gentleman --

1 A. You are correct.

2 Q. Okay. Dipan Shah, and it is to Michael Sotnick,  
3 Dan Kraus, yourself, and a number of other individuals,  
4 and those other individuals are also employees of SAP, at  
14:52:51 5 least as of the time of the e-mail, correct?

6 A. I don't recognize all those names as SAP employees  
7 but it is safe to assume that.

8 Q. Thank you. Who was Mr. Shah at the time?

9 A. You know, I don't know his role. It says here,  
14:53:13 10 service manager. I did interact with him, but I don't  
11 remember specifically what he did as service manager.  
12 I'm sorry.

13 Q. And the subject matter of the e-mail is  
14 Hodell-Natco recap. Correct?

14:53:26 15 A. That is correct.

16 Q. And I would like to focus on the first paragraph.  
17 This is November -- well, the date of this e-mail is  
18 November 3, 2007, and as I read this e-mail, it outlines  
19 the reasons why Hodell must move on from Business One and  
14:53:58 20 move to another product. Is that a fair reading of the  
21 e-mail? Yes or no.

22 A. Would you kindly ask me the question again then,  
23 please?

24 Q. Sure. As I read this document, this document is  
14:54:12 25 summarizing the Hodell-Natco situation, and it outlines

1 reasons why Hodell-Natco must move from Business One. Is  
2 that fair? If not, then tell me it's not.

3 A. That is a fair summary of the e-mail, yes.

4 Q. Okay.

14:54:34 5 A. Sir. I'm sorry. I didn't mean to get casual.

6 Q. That's okay. Can I direct your attention to the  
7 second paragraph?

8 A. I'm there.

9 Q. Can you read -- can you read the first sentence?

14:54:55 10 A. We agreed on the fact that we need to move this  
11 customer to A1, not only based on the fact that the DI is  
12 an issue, but also on the fact that there are a large  
13 number of documents and users, which makes this customer  
14 a non-sweetspot project of Business One. We've reached  
14:55:15 15 the point where any more work will only bring diminutive  
16 returns on improving the DI.

17 Q. Thank you. The DI -- well, first of all, A1, A1  
18 is another SAP software package, correct?

19 A. That is correct.

14:55:30 20 Q. Okay. DI, the reference to DI in this, in the  
21 first paragraph of this e-mail, that's the DI-API?

22 A. Yes.

23 Q. And that's part of the base functionality of the  
24 SAP Business One. Correct?

14:55:48 25 A. I wouldn't characterize it that way, no.

1 Q. It's not an add-on?

2 A. No. But it is a pipe that connects add-ons.

3 Q. It is not an add-on, correct?

4 A. It is not an add-on.

14:56:01 5 Q. Thank you. It is something that is developed by  
6 SAP, correct?

7 A. That's correct.

8 Q. Thank you. And Mr. Shah summarizes that we have to  
9 get him off Business One because they are a large number  
14:56:23 10 of document -- they have a large number of documents and  
11 a large number of users. Correct?

12 A. That is correct.

13 Q. There is no reference in the first paragraph of  
14 this e-mail to add-ons, is there?

14:56:39 15 A. That is correct.

16 Q. And there is no reference to In-Flight in this  
17 e-mail. Correct?

18 MR. KELLEHER: Objection. The document  
19 speaks for itself.

14:56:59 20 THE COURT: Go ahead.

21 A. Correct.

22 Q. I would like to ask you about Exhibit 267 if you  
23 don't mind.

24 A. I'm there.

14:57:35 25 Q. This is a two-page internal SAP e-mail. Correct?

1 A. That is correct.

2 Q. Let's start with the first e-mail in the chain. It  
3 starts on the first page of the document, at the bottom.

4 Do you see that? It's from Dan Kraus to you, on

14:57:58 5 September 29, 2007.

6 A. That is correct.

7 Q. And the subject of the document is Hodell-Natco  
8 spend to date. Right?

9 A. That is correct.

14:58:09 10 Q. And he is asking you to reach out to Kevin -- and  
11 I assume that would be Kevin Reidl -- to find out what  
12 their expenses have been to date?

13 A. That's correct.

14 Q. And you responded to Mr. Kraus in an e-mail on  
14:58:30 15 October 1, 2007, correct?

16 A. That is correct.

17 Q. And you talk about direct costs that they have  
18 incurred. Correct?

19 A. Yes, I do.

14:58:43 20 MR. KELLEHER: Judge, objection. This is  
21 hearsay.

22 THE COURT: Overruled.

23 BY MR. CARNEY:

24 Q. You talk about direct costs of \$550,000 that they  
14:58:54 25 have incurred up to this date. Correct?

1 A. That is correct.

2 Q. And close to \$70,000 in hardware costs. Correct?

3 A. Well, I say -- yes, closer to 70K, yes. That's  
4 what I say.

14:59:10 5 Q. And HW refers to hardware. Correct?

6 A. Correct.

7 Q. And SW refers to software?

8 A. Yes, sir.

9 Q. Okay. And then you list a whole series of indirect  
14:59:23 10 costs that they have incurred?

11 A. That is correct.

12 Q. Okay. Meeting time, people, 400,000, and you say  
13 "this figure is not a line item, rather it is a delta  
14 item versus a shortfall in the sales versus last year and  
14:59:42 15 other factors I didn't ask for, correct?

16 A. That is correct.

17 Q. And you forwarded this information on to Mr. Kraus.

18 A. That's correct.

19 Q. Thank you.

15:00:00 20 MR. CARNEY: Your Honor, this might be a  
21 good time to take a break.

22 THE COURT: Okay. We can do that. Folks,  
23 are you ready for your afternoon recess?

24 Okay. Keep in mind the admonition. See  
15:00:12 25 you in about 15 or 20 minutes.

1 (Recess had.)

2 (Proceedings outside the presence of the  
3 jury:)

4 MR. CARNEY: Let me try it and you can jump  
15:03:37 5 in if I say it inaccurately. The parties are stipulating  
6 that Exhibit 615 reflects the 2013 annual report for SAP.

7 MR. MILLER: And we stipulate that the  
8 document you are referencing says what it says. Period.

9 THE COURT: But it is the annual report,  
15:04:21 10 isn't it?

11 MR. MILLER: If that's what it says, then  
12 that's what it says.

13 THE COURT: All right.

14 MR. MILLER: I'm not even familiar with the  
15:04:27 15 document.

16 THE COURT: All right. We're good.

17 MR. CARNEY: Thank you, Your Honor.

18 Then I'm done with the witness.

19 (Luncheon recess had.)

15:23:01 20 THE COURT: You may inquire.

21 MR. KELLEHER: Thank you, Your Honor.

22 CROSS-EXAMINATION

23 BY MR. KELLEHER:

24 Q. Good afternoon, Mr. Killingsworth.

15:23:06 25 A. Good afternoon.

1 Q. Mr. Carney asked you some questions about your  
2 background. You remember that right?

3 A. I do.

4 Q. I would like to flush that out a little bit. Could  
15:23:18 5 you tell us your current role is at SAP?

6 A. I will say the mouthful again. I'm currently  
7 senior director for customer relations and solution  
8 experts for Business One North America.

9 Q. In 2007, what was your role at SAP?

15:23:33 10 A. In 2007 the official title was senior manager for  
11 customer relations, but it was fairly characterized as  
12 escalation managers, yes.

13 Q. And, sir, how do those two roles relate to each  
14 other?

15:23:44 15 A. So I now manage the previous role. The senior  
16 manager, I'm the senior director, so I manage that  
17 individual.

18 Q. Sir, I'm talking about your role in 2007.

19 A. I'm sorry.

15:23:58 20 Q. No, no. For my next question.

21 A. Oh, okay.

22 Q. What did you do in that role?

23 A. So as we discussed, one of the things that -- I  
24 mean generally speaking, you know, customers get all of  
15:24:15 25 their issues handled through the usual means, but when



1 the customer needs to speak to somebody at SAP, for  
2 whatever reason, things are not handled through the  
3 proper channels or there is a problem or they need to  
4 speak to SAP, they would come to us and that's what our  
15:24:34 5 role was.

6 Q. How long have you worked for SAP?

7 A. Going on nine years now.

8 Q. And is that all with a single product?

9 A. Yes. Correct. I only dealt with Business One  
15:24:46 10 during that tenure.

11 Q. Before you were employed by SAP, you had a job?

12 A. That's correct.

13 Q. And what was that job, sir?

14 A. As we mentioned, I was a reseller, since about 1994  
15:24:59 15 was a reseller for about 12 years.

16 Q. When you say a reseller, sir, was one of the  
17 products you resold Business One?

18 A. It is. We also sold other products as well.

19 Q. So how many years in total, sir, have you worked  
15:25:13 20 with Business One?

21 A. So I've worked with Business One since around 2002,  
22 2003, since it was introduced into the United States.

23 Q. Sir, Mr. Carney asked you a series of questions  
24 about e-mails that you received and things that you may  
15:25:30 25 have done while you were on the project at Hodell. Do

1 you recall that line of questioning in general?

2 A. I do.

3 Q. How did you first -- when did you first become  
4 familiar with Hodell?

15:25:40 5 A. Very first became familiar in March of 2007.

6 Q. How did you gain that familiarity?

7 A. So I received an e-mail from our then vice  
8 president, Dan Kraus, alerting me that there were  
9 problems at this customer and he wanted me to investigate  
10 further.

15:25:56

11 Q. And what, sir, was specifically your assignment or  
12 your mission while you were at Hodell?

13 A. So primarily my job was to get involved, find out  
14 what was going on, find out where the problems were, and  
15 find out what, if anything, we could do to help.

15:26:12

16 Q. Sir, was there a team of people from SAP involved  
17 in that effort?

18 A. There were, yes.

19 Q. And what was your role vis-à-vis that team?

15:26:22 20 A. So my job was primarily the liaison. I was the  
21 in-between kind of guy. I was the one coordinating all  
22 the resources, making phone calls, connecting with  
23 people, coordinating the efforts from our side.

24 Q. Very good. So let's talk about what happened.

15:26:37 25 What was the first thing you remember doing on this

1 project?

2 A. The first thing I remember, it was calling the  
3 reseller at the time, LSi, which is usual and standard  
4 for us. The very first call we make is to the reseller  
15:26:54 5 to find out what is going on.

6 Q. Sir, when you reached out to IBIS/LSi, what did  
7 they tell you?

8 A. I believe my first conversation was with Mr.  
9 Lowery, and he told me that they were experiencing --  
15:27:06 10 they, the customer, Hodell-Natco, were experiencing  
11 tremendous performance problems and he told me that they  
12 were having a lot of issues and that the issues  
13 related -- were related to Business One.

14 Q. After you spoke to Mr. Lowery, what did you do  
15:27:27 15 next?

16 A. Well, you know, we talked about what -- what the  
17 problems were and then we went through the usual process  
18 of starting to maybe apply software patches and see if we  
19 could find a way in the software to help alleviate some  
15:27:43 20 of the problems.

21 Q. So let me stop you there for a second. When you  
22 say software patches, can you explain to the jury what  
23 you mean by that?

24 A. Sure. So when you like have your Apple iPhone and  
15:27:53 25 gets updated, you get a new release of the operating

1 system or whether it is Windows or pretty much any other  
2 software, you get an update, affix to the release, that's  
3 what these patches -- at SAP we call those patches.

15:28:12 4 Q. Sir, in your role with customer relations at SAP,  
5 was that a normal approach for you to take in dealing  
6 with customer issues? I'm talking about the software  
7 patches.

8 A. Absolutely. Very customary for us, yes.

9 Q. So, sir, how did the process of applying patches  
15:28:25 10 work at Hodell?

11 A. Well, quite frankly, initially, it was -- we had  
12 mixed results. Some of the first patches weren't as  
13 helpful as we had hoped. But then not long thereafter,  
14 we started seeing some significant improvements.

15:28:42 15 Q. Sir, do you have any sense for why the initial  
16 patches -- patches, why you experienced what you call  
17 mixed results?

18 MR. CARNEY: Objection, Your Honor. I  
19 mean, he is a customer relations guy.

15:28:58 20 THE COURT: Do you know the answer? Do you  
21 know why it didn't work?

22 THE WITNESS: I do.

23 THE COURT: Okay. Tell us.

24 THE WITNESS: So typically speaking, with a  
15:29:05 25 patch, what we are doing is we're going after specific

1 bugs, specific problems. Well, in a normal situation, we  
2 have the luxury of time to diagnose things to figure out,  
3 okay, exactly what's the problem, exactly where is the  
4 issue, exactly what line of code is causing the problem  
15:29:22 5 and then we can address it.

6 This situation was a little different,  
7 because we were in a live environment. The customer had  
8 turned the switch, turned the software on and were  
9 running their business on the software.

15:29:35 10 We didn't find out that there were these  
11 problems, these performance issues until after they had  
12 gone live. Traditionally, we uncover this kind of thing  
13 during testing, before they go live. And that didn't  
14 happen here. We found out in live. So, to answer the  
15:29:52 15 question, we didn't -- we didn't have the luxury to try  
16 and diagnose every little thing. We were just trying to  
17 put something out there as quickly as possible that we  
18 hoped would actually help and it wasn't until later when  
19 we had more time we were able to get specific.

15:30:11 20 Q. You mentioned you find these things out during  
21 testing. Do you recall saying that?

22 A. I do.

23 Q. Specifically, what kind of testing?

24 A. There is two types of testing. There is functional  
15:30:21 25 testing, or what we call end user testing and it is where

1 a -- where customers will test the product for  
2 functionality. You make sure it is doing what it is  
3 supposed to do, make sure that their operations, their  
4 daily work is doing -- that the software is performing  
15:30:38 5 correctly.

6 The second type of testing is what we call  
7 load testing. Load testing is where you put everybody on  
8 the system and you pound away at it to see if it can  
9 handle the load. And it was our understanding that there  
15:30:52 10 had been some functional testing but very, very limited  
11 if any load testing done.

12 MR. CARNEY: Objection, Your Honor.

13 THE COURT: Overruled.

14 BY MR. Kelleher:

15:31:01 15 Q. Mr. Killingsworth, whose responsibility is it to do  
16 the road testing? Is that SAP or the reseller?

17 A. It is the reseller and the customer together, not  
18 SAP.

19 Q. Sir, Mr. Carney showed you an e-mail from a man  
15:31:16 20 named Udi Ziv. Do you remember seeing that document?

21 A. I do.

22 Q. Let me show you the exhibit. I have a binder for  
23 you.

24 A. I prefer binders.

15:31:27 25 Q. I believe it is Exhibit 69. Sir, it should be at

1 the first tab. Let me know when you are there?

2 A. I'm at the tab, but I don't have any glasses.

3 Q. Very good. We'll wait for you.

4 A. I'll get there. I'm there.

15:32:05 5 Q. Move to page 3. There is an e-mail in the middle  
6 of the page from Udi Ziv to Dan Kraus?

7 A. I see it.

8 Q. Was this the e-mail that Mr. Carney asked you  
9 questions about?

15:32:14 10 A. Yes, it appears so.

11 Q. And I think he asked you to read a sentence. Do  
12 you remember that?

13 A. I do.

14 Q. And the sentence he asked you to read was someone  
15:32:22 15 has sold to the wrong customer, which is way above any  
16 sane B1 Sweet Spot, 120 users. Is that the sentence that  
17 he asked you to read?

18 A. That is correct.

19 Q. Sir, do you -- when you received this e-mail, did  
15:32:37 20 you agree with that sentence?

21 A. I did not agree with that sentence.

22 Q. Can you tell me why you did not agree with it?

23 A. I believe that Mr. Ziv was coming to the conclusion  
24 that someone had sold to the wrong customer, and I don't  
15:32:52 25 think he had enough information to arrive at that

1 decision. He knew it was 120 users, which yes, we agreed  
2 was above the Sweet Spot, but that doesn't mean that it  
3 is inappropriate. It doesn't mean it can't work. If you  
4 think of a Sweet Spot, like a tennis racket, it is, it is  
15:33:12 5 only this big. The spot in the middle of the racket is  
6 this big. But the rest of the racket still can work. He  
7 is saying this information he had, 120 users, and I think  
8 he knew at some point there were add-ons, he jumped to  
9 the conclusion, like a knee jerk reaction, this can't be  
15:33:31 10 right, this is wrong, and I totally disagreed with that.

11 Q. Sir, Mr. Ziv, where does he work?

12 A. He worked in -- we mentioned this in SAP labs  
13 Israel.

14 Q. And just to ask a stupid question, he was  
15:33:45 15 physically located, to the best of my knowledge, in  
16 Israel, the country?

17 A. That is correct. He was overseas.

18 Q. Do you have any understanding of whether Mr. Ziv  
19 ever visited Hodell?

15:33:53 20 A. No. He did not. In fact, he was in development,  
21 and we were in the field, and that was one of the other  
22 reasons why I came to the conclusion that he just is  
23 jumping to a conclusion without all the information, we  
24 were much, much closer to the situation, and I just  
15:34:09 25 didn't agree with his initial assessment here.



1 Q. Sir, you just drew a distinction between  
2 development on the one hand and the field on the other.

3 Can you give the jury, explain what you  
4 meant by that to the jury?

15:34:21 5 A. Yes, sure. So development is the programmers, the  
6 guys that are in the office, writing the code.

7 We consider the people that are out in the  
8 field like myself dealing with the customers, doing  
9 sales, doing implementations, consulting, the people that  
15:34:36 10 have their hands on the product, outside with the  
11 customers in the field.

12 Q. Thank you, sir. I want to shift gears a little  
13 bit.

14 Hodell has talked about in this case the  
15:34:44 15 issue of screen locking. Are you generally familiar with  
16 what a screen lock is?

17 A. I am.

18 Q. Would you mind briefly explaining to the jury what  
19 a screen lock is?

15:34:53 20 A. I bet most of us have probably experienced it  
21 recently.

22 On your computer or your device, whatever,  
23 you are sitting there tapping, and it is not doing  
24 anything. That's a screen lock. And that's what they  
15:35:07 25 were experiencing at Hodell.

1 Q. Thank you, sir. I would like to show you what we  
2 marked as Exhibit 258. Can you turn to that in your  
3 binder? It should be at Tab 3.

4 A. Yes, sir. I'm there.

15:35:22 5 Q. I would like to -- the e-mail on the bottom half  
6 of the first page --

7 A. I see it.

8 Q. Do you recognize this document, sir?

9 A. Yes, sir, I do.

15:35:33 10 Q. Can you please tell the jury what this document is?

11 A. Yes. This is a rather lengthy document that I put  
12 together late one night for Dan Kraus, who was the VP of  
13 Business One. It is essentially a summary of the events  
14 that had happened since the beginning until this point in  
15:35:54 15 time.

16 Q. Sir, at this point in time on the project, was  
17 putting together summaries like this part of your, the  
18 scope of your responsibilities with SAP?

19 A. All the time, yes, sir.

15:36:04 20 Q. Sir, I would like to draw your attention to page  
21 three.

22 Can you let me know when you are there?

23 A. I'm there.

24 Q. Specifically, I'm interested in the entry that  
15:36:17 25 reads April 12, 2007. I know there are two entries for

1 that date, but I'm going to be focused on the first one.

2 A. I'm there.

3 Q. Okay. Are we there? Good. It is on the screen as  
4 well.

15:36:29 5 Can you read the first entry for April 12,  
6 2007?

7 A. "April 12, 2007, no noticeable improvements in  
8 performance after a few days of running with PL 20 --  
9 patch level 20 -- however, locking issue seems to be  
15:36:44 10 much better. IBD, and that" -- can I define what IBD  
11 means.

12 Q. Please do.

13 A. It means "installed base development." We talked  
14 about development a second ago. The programmers that work  
15:36:58 15 on the new product that are coming out, you know, the new  
16 version, the update, and there are the programmers that  
17 work on the product that is already in the field that,  
18 is already in the hands of people. So somebody may be  
19 working on a version that has not even been released yet.  
15:37:11 20 These guys, the IBD, installed base development, they are  
21 the ones working on the product out in the field right  
22 now.

23 So IBD -- whereas I -- apparently added  
24 code that creates, quote, dumb files, whenever a database  
15:37:26 25 lockup occurs, which provides significant information for

1 future diagnosis.

2 Q. Sir, with respect to PL 20 is that one of those  
3 initial patches that you described that didn't work as  
4 well as you might have hoped?

15:37:38 5 A. Correct. This is about a month after we got  
6 involved. Yes.

7 Q. And specifically about the database lockups, what  
8 did you mean when you wrote this entry?

9 A. Well, what we're saying is at this point in time,  
15:37:49 10 we don't see much performance improvement but the screen  
11 lockups that had been reported to us, we're not seeing  
12 that at this time. It seems to have involved the  
13 problem.

14 Q. Sir, did those screen lockups ever resolve?

15:38:01 15 A. Yes, eventually they went away completely.

16 Q. And do you have any sense of when that was, sir?

17 A. It would be -- I think it was in May, just a  
18 few -- yes, it was. It was in May -- May 22nd, if you  
19 look at that entry. May 22, 2007. We also see

15:38:20 20 significant performance improvements and there have been  
21 no database lockups, significant milestone. I don't know  
22 specifically between those two points if there had been  
23 an occurrence or not but we know there had been no  
24 reports at this time.

15:38:34 25 Q. Thank you, sir.

1 And in terms of your job on the project,  
2 you would know, you would be the person that would know  
3 whether or not there were reports of those lockups  
4 subsequent.

15:38:43 5 A. Absolutely. Because we were checking in frequently  
6 to find out what the status was, having frequent calls,  
7 frequent e-mails, trying to determine where are we, are  
8 things working, where are the improvements, so the answer  
9 to the question is yes, sir.

15:38:55 10 Q. Sir, you just mentioned frequent calls and frequent  
11 checking in. With whom were you referring?

12 A. Primarily -- well, I mean, it's everybody. In my  
13 job, we were speaking with a lot of -- a lot of times we  
14 were speaking with the reseller, IBIS/LSi. Had the  
15:39:12 15 occasional update with the customer, Hodell-Natco. But  
16 there was a lot of internal conversations and e-mails  
17 working on the project.

18 Q. Sir, we talked about software patches and you  
19 mentioned initially there were mixed resulting. Did  
15:39:32 20 Hodell eventually start seeing good results from the  
21 application of software patches?

22 A. Yes. In fact, the entry I just read to you -- I  
23 wrote, I misspelled it, I'm not sure how I missed that.  
24 It was a significant milestone because performance is  
15:39:47 25 improved and I put in parentheses by customer assessment

1 50 percent or so.

2 Q. Sir, when you wrote "customer assessment," who  
3 were you referring to?

15:39:58

4 A. Hodell-Natco had reported to us that they were  
5 seeing an improvement of 50 percent, yes.

6 Q. Do you have a recollection of who at Hodell-Natco?

7 A. I believe it was Mr. Kevin Reidl.

8 Q. Sir, I would like you to look at the next entry, on  
9 May 23, 2007.

15:40:12

10 A. I see that.

11 Q. It says "customer states that gains are good, but  
12 only another 50 percent improvement will be deemed  
13 acceptable." Do you see that, sir?

14 A. I do.

15:40:21

15 Q. And you wrote that?

16 A. I did.

17 Q. And what did you mean by that, sir?

18 A. Well, pretty much what it says, that they were  
19 pleased that we had this, this improvement, but by their  
20 assessment, they wanted to see another 50 percent before  
21 they would consider it resolved.

15:40:34

22 Q. Very good, sir. I would like to talk a little bit  
23 more about this patch level 25. I would like to show you  
24 Exhibit 439. You can flip to it in your binder. I'm  
25 actually going to look at the third page, the e-mail that

15:40:51

1 is basically on the bottom of that page. Let me know  
2 when you are there, sir?

3 A. I'm there.

4 Q. I'm trying to wait for the monitor to catch up.

15:41:05 5 Looks like we are good.

6 Sir, do you recognize this e-mail?

7 A. I do.

8 Q. And can you tell me what it is?

9 A. It is an e-mail from Dan Lowery -- can I make sure

15:41:19 10 we're talking about the same thing?

11 Q. Sure.

12 A. Are we at the bottom of page three, counsel?

13 Q. Yes, we're on the bottom of page three. The  
14 document says from D. Lowery, sent Tuesday, May 27, 2007.

15:41:29 15 A. Very good. This is an e-mail from the reseller,  
16 Dan Lowery, to some SAP people and he copied some people  
17 also in his organization as well.

18 Q. Sir, were you copied on this e-mail?

19 A. I was, yes.

15:41:43 20 Q. So you would have received this e-mail in the  
21 ordinary course of your business at SAP?

22 A. Yes, sir, I would have.

23 Q. Would you have reviewed this document at that time?

24 A. Absolutely yes.

15:41:54 25 Q. And, sir, would you also, because of the way e-mail

1 works, also have received all of the earlier e-mails on  
2 this chain?

3 A. Yes, sir.

4 Q. And did you review those e-mails?

15:42:05 5 A. Yes, sir, I did. I'm sorry, I didn't let you  
6 finish. My bad.

7 Q. Your answer was yes, you did?

8 A. That's correct.

9 Q. I would like to move to the very last page, the  
15:42:19 10 e-mail on that page. It is page number seven.

11 A. Yes, sir. I'm there.

12 Q. And I think just for you, for the monitor, on page  
13 six we have the header.

14 Do you recognize this document, sir?

15:42:42 15 A. I do.

16 Q. Can you tell the jury what it is?

17 A. In is an e-mail from Dan Lowery to Kevin Reidl --  
18 to Kevin and Otto Reidl and he is copying a couple people  
19 on his team. The subject is Dan Lowery, Monday update,  
15:42:58 20 and the date of it is the 21st of May, 2007.

21 Q. Very good, sir. Can you flip to the last page?  
22 That's the substance of the e-mail, it appears like?

23 A. I'm there.

24 Q. Sir, it says -- I'm at the line where it says order  
15:43:12 25 entry?



1 A. I'm there.

2 Q. Can you read that paragraph to the jury, please?

3 A. "Order entry. Small orders are seeing significant  
4 improvement in entry time. Larger orders are seeing  
15:43:23 5 entry per line improvements to one to two seconds, with  
6 no degradation after the 43rd line, where previously the  
7 system started tanking on speed. The order process to  
8 enter a 91 line order was continuous, one to two seconds  
9 per line."

15:43:40 10 Q. Sir, when you read this, what was your  
11 understanding of what was being said there?

12 MR. CARNEY: I object on hearsay grounds.  
13 This is -- he has no first-hand knowledge of any of  
14 this.

15:43:50 15 MR. KELLEHER: Judge, the witness testified  
16 he read the e-mails contemporaneous with receiving them  
17 and I asked him his understanding.

18 THE COURT: Right. Go ahead.

19 A. So, it was my understanding that there was a  
15:43:59 20 significant improvement in the performance and they had  
21 started seeing times of one to two seconds for entry and  
22 the order process to enter a 91 line item was one to two  
23 seconds so this was a significant improvement.

24 Q. Do you see right below that where it says lockups?

15:44:21 25 A. I do.

1 Q. Read that?

2 A. It appears we have no lockups in Radio Beacon or  
3 the SAP application as of 3:40 eastern daylight time.  
4 These were two specific areas of attention on patch level  
15:44:32 5 25, significant if it -- if it is permanently resolved.  
6 We did have two In-Flight lockups in process, in process  
7 ticket entree, both of which are being reviewed.

8 Q. What was your understanding when you read that?

9 A. The understanding is that the Radio Beacon add-on  
15:44:51 10 and the SAP product was not getting any more lockups but  
11 they were seeing a couple of lockups in the In-Flight  
12 add-on.

13 Q. And the In-Flight, sir, do you understand who  
14 developed the In-Flight add-on?

15:45:03 15 A. IBIS/LSi.

16 Q. Did SAP develop that add-on?

17 A. No, sir, we did not.

18 Q. Sir, can you move to page 5. There is an e-mail  
19 there. Let me know when you are there.

15:45:15 20 A. I'm there.

21 Q. Do you recognize this e-mail, sir?

22 A. Yes, sir, I do.

23 Q. Did you read it when you received it?

24 A. It was received --

15:45:25 25 Q. Sir, my question was whether you read this e-mail

1 when you received it?

2 A. Oh, I'm sorry. I didn't understand you.

3 Yes, I did read this when I received it,  
4 yes.

15:45:33 5 Q. Who wrote the e-mail, sir?

6 A. It was written by Jon Woodrum from LSi  
7 International.

8 MR. CARNEY: Objection.

9 MR. KELLEHER: He was part of the e-mail  
15:45:52 10 chain.

11 THE COURT: I thought he said he saw that.

12 MR. CARNEY: He may have seen it during the  
13 course of this litigation. He is not a party.

14 THE COURT: I thought he said he got it  
15:46:01 15 contemporaneous with the issuance of it. Is that right?

16 THE WITNESS: That is correct, sir.

17 THE COURT: Okay. Go ahead.

18 BY MR. KELLEHER:

19 Q. Mr. Killingsworth, I would like to direct your  
15:46:09 20 attention to the first sentence. It says the visit to  
21 the STL store was a really good one. Do you see that?

22 A. I do.

23 Q. What's the STL store?

24 A. I believe that stands for St. Louis.

15:46:20 25 Q. And whose store?

1 A. The customer's Hodel-Natco.

2 Q. Sir, the last paragraph on the page, it starts with  
3 the words "Cain and I." Do you see that?

4 A. Yes.

15:46:30 5 Q. Do you have an understanding of who Cain is?

6 A. Cain worked for LSi.

7 Q. And can you read that paragraph to the jury, sir?

8 A. Cain and I were there for about 7:15 until near  
9 noon. Mostly observed deliveries and orders, the areas  
15:46:45 10 reported as previously the most difficult due to  
11 performance. But we did observe and visit with Melissa  
12 in accounting as well. Cain helped her on some specific  
13 questions while there. Marty entered a 91 line order.  
14 It never slowed down throughout the order and took two to  
15:47:00 15 three seconds to update when finished. They say it does  
16 get slower as the day unfolds, more users, more  
17 activities, but I didn't notice much difference during  
18 the hours we were there.

19 Q. Thank you, sir. And what was your understanding  
15:47:13 20 when you read this?

21 A. Just additional confirmation that what -- what  
22 they were -- what they had been reported they were now  
23 seeing.

24 Q. Thank you, sir. Mr. Carney when he asked you  
15:47:24 25 questions, he asked you questions about Exhibit 89. Do

1 you remember that, sir?

2 A. You will have to refresh my memory exactly what 89  
3 was but I do remember being asked.

4 Q. Why don't you flip to the next tab, sir, and take a  
15:47:38 5 look.

6 A. Now I remember.

7 Q. Sir, do you recognize this document?

8 A. Yes, sir, I do.

9 Q. Can you explain to the jury what it is?

15:47:49 10 A. This is an e-mail from me to the Reidl's, Mr. Kevin  
11 and Otto Reidl. I have copied some people both at SAP  
12 and LSi and it is dated June 6, 2007.

13 Q. As a general matter, what are you discussing in  
14 this e-mail?

15:48:08 15 A. Generally speaking, what I am -- well, first off,  
16 in the first paragraph, I tell them they are a very  
17 important customer to SAP, which was true, but I also  
18 told them that there was a new version coming, version  
19 2007. It wasn't a patch. This is a whole new version of  
15:48:29 20 Business One, and it was coming very soon and we were  
21 seeing on our side performance improvements anywhere  
22 between 20 and 80 percent and I was telling them that  
23 maybe they should consider perhaps going to that, that  
24 version. It might give them some additional relief.

15:48:42 25 Q. Sir, I would like to direct your attention to the

1 fourth paragraph. It starts with we do believe?

2 A. I'm there.

3 Q. I'm waiting for the monitor to catch up with us.

4 Thank you.

15:48:59 5 Can you tell us very briefly what you were  
6 telling to Hodel with this paragraph?

7 A. May I review it just briefly?

8 Q. Absolutely, sir. Take your time.

9 A. Thank you. I'm stressing the importance of  
15:49:14 10 creating a test environment.

11 The first go-live was without a test  
12 environment. We saw what kind of problems that can --

13 MR. CARNEY: Objection, Your Honor, he has  
14 no first-hand knowledge and he mischaracterized the  
15:49:27 15 testimony of every other witness who does have first-hand  
16 knowledge. He has no knowledge --

17 THE COURT: You can examine him on it. Go  
18 ahead.

19 MR. KELLEHER: Your Honor, might have to  
15:49:37 20 strike counsel testimony.

21 THE COURT: You know what I told you the  
22 lawyers say is not evidence anyway. Sometimes they get  
23 feisty and want to say something, so you take it with a  
24 grain of salt. Okay?

15:49:51 25 BY MR. KELLEHER:

1 Q. Please continue your answer.

2 A. I got distracted. Can you ask the question again?

3 Q. I did, too. The fourth paragraph starts with we do  
4 believe. I asked you what you meant when you wrote that?

15:50:02 5 A. Oh. The testing.

6 So we were stressing the importance of a  
7 test environment. We are saying that yes, we're seeing  
8 2007 is a big improvement on our side, we built a faster  
9 machine. And we think you can benefit from it. But  
10 before you just upgrade your current system, put it in a  
11 test environment and make sure you see the same kind of,  
12 you know, improvement we are seeing. We're telling them  
13 to be cautious.

14 Q. Sir, do you know whether Hodell ever decided to  
15 upgrade to version 2007?

16 A. To the best of my knowledge, they never did.

17 Q. Sir, how long would it take, if you know, Hodell to  
18 upgrade to version 2007?

19 A. I can't say with specificity, but it would take in  
20 the order of hours and days in order to get that done.

21 Q. And do you know why? And only if you know, sir.  
22 Let me finish. Do you know why Hodell didn't upgrade to  
23 version 2007 like you recommended?

24 A. To the best of our knowledge it was because the  
15:51:06 25 In-Flight add-on wasn't compatible with 2007, so if they

1 go to 2007, they would lose the add-on that they needed.

2 Q. Sir, and forgive me for this question, but were you  
3 trying to mislead Hodell when you sent this e-mail?

4 A. Absolutely not, sir. We all were trying to do

15:51:29 5 everything possible to help them find some relief. We

6 looked at every option. We were exploring different

7 avenues. We were considering patches. We were

8 considering what we could do with the add-on. We were

9 considering all available options to try to get them some

15:51:45 10 relief and this was one option, and in no way were we

11 trying to mislead them. It is a little confusing. I

12 don't see how this could be misleading.

13 Q. Sir, did anyone from your team ever go out to

14 Hodell and analyze the performance results that they were

15:52:00 15 actually experiencing?

16 A. Yes, sir. Twice.

17 Q. Sir, I would like to talk to you about the first

18 one of those two if you don't mind?

19 A. Okay.

15:52:09 20 Q. I would like to show you what I marked as Exhibit

21 901. It is the next tab.

22 A. I'm there.

23 Q. Do you recognize this document?

24 A. Yes, sir, I do.

15:52:18 25 Q. Can you please tell the jury what it is?



1 A. This is an e-mail from a gentleman on our team  
2 named Gadi Barnea. He was a solution expert, and Manfred  
3 Weis, who at the time was his manager. It is dated July  
4 8, 2007.

15:52:41 5 Q. And you received this e-mail, sir?

6 A. I did.

7 Q. And when did -- when did Mr. Barnea send this to  
8 you?

9 A. On July 8th, early in the morning.

15:52:53 10 Q. And this was after his visit to Hodell-Natco?

11 A. Yes. I'm sorry, this was after he had been on  
12 site, and the contents of this e-mail is his report based  
13 on his assessment when he was on site. That is correct.

14 Q. Sir, was it part of your duties at the time to  
15 receive and analyze reports like this from members of  
16 your team?

17 A. All the time.

18 Q. And specifically on this project with Hodell, was  
19 that part of your job?

15:53:17 20 A. Absolutely. Yes, sir.

21 Q. Sir, I would like to take a look at some of the  
22 things that Mr. Barnea told you in this e-mail. Can you  
23 look down to the line where it says to give you the  
24 underlying result first?

15:53:30 25 A. I see it, yes.

1 Q. I'm just going to wait until the monitor catches up  
2 with us.

3 A. Okay.

4 Q. It says "to give you the underlying result first, I  
15:53:39 5 can break down the cause of the performance issues into  
6 three different categories. 80 percent of the issues  
7 results of the In-Flight add-on or DI API issue. 10  
8 percent from SAP core product. 10 percent from Hodell  
9 network and hardware configuration."

15:53:58 10 Do you see that, sir?

11 A. Yes, sir.

12 Q. What was your understanding of what Mr. Barnea was  
13 conveying to you when he wrote those words?

14 A. My understanding was a vast majority of the  
15:54:13 15 performance problems they were experiencing was not the  
16 Business One core product. Rather, it was with the  
17 In-Flight add-on, the DI API and the Hodell network.

18 Q. Sir, I would like you to direct your attention to a  
19 sentence later. It says "it is not only" that's where it  
15:54:29 20 starts. Do you see that?

21 A. Yes.

22 Q. Can you read that very small paragraph to the jury?

23 A. It is not only that the majority of the users are  
24 driven by the add-on. These are also the items with the  
15:54:40 25 highest priority since it affects each document.

1 Q. Sir, what was your understanding, if any, when you  
2 read that line?

3 A. That again, Mr. Barnea is reiterating that the  
4 biggest problems he saw were with the add-on, not with  
15:54:53 5 the core product.

6 Q. Sir, the next two sentences, could you read those  
7 to the jury?

8 A. As an example -- is that the sentence?

9 Q. Yes.

15:55:03 10 A. As an example, we run a test for adding a delivery  
11 with 100 lines. It took 25 seconds without the add-on  
12 but once we started, the processing time jumped to more  
13 than 15 minutes. Updating a sales order with 296 line  
14 items took 80 seconds without the add on and almost 13  
15:55:21 15 minutes with it.

16 Q. And, sir, the add-on that we're talking about here,  
17 that's the In-Flight add-on, right?

18 A. Yes, sir, that's correct.

19 Q. And what was your understanding when you read these  
15:55:29 20 two sentences?

21 A. Well, Mr. Barnea, in order to try to diagnose where  
22 the problem was, turned the add-on off. He said we won't  
23 have the software turn on the add-on software. When he  
24 ran the test with the same exact process with the add-on  
15:55:45 25 turned on, in one case it was like, what, 30 times

1 longer, and in another case, it was -- I can't do the  
2 math that fast, but it was 80 seconds without and 13  
3 minutes with, a significantly longer amount of time with  
4 it on.

15:56:00 5 Q. Sir, these statements that we just read, were they  
6 based on actual tests that Mr. Barnea did while he was on  
7 site at Hodell?

8 A. Absolutely, yes.

9 Q. Sir, the third sentence from the bottom, it says "I  
15:56:13 10 have attached the spreadsheet with the full test  
11 results." Do you see that?

12 A. Yes, sir, I do.

13 Q. Do you remember reviewing that spreadsheet when you  
14 received this e-mail, sir?

15:56:22 15 A. Yes, sir, I do.

16 Q. Can you flip to the third and final page of this  
17 exhibit?

18 A. I'm there.

19 Q. I'm waiting for the screen. 901.3.

15:56:48 20 Can you blow that Excel up?

21 Sir, is this the spreadsheet that you were  
22 just talking about?

23 A. Yes, sir, it is.

24 Q. And can you please tell the jury what we are  
15:56:58 25 looking at here?

1 A. Well, if you look at the far left column, Column A,  
2 he says at all times are in seconds here, but what he is  
3 looking at down the column are transactions. These are  
4 the types of transactions this customer and other  
15:57:13 5 customers might do in their business, so these are the  
6 transactions.

7 Then if you go over to the other columns,  
8 these are tests in various configurations and using  
9 different, like with clients and without the clients,  
15:57:24 10 with Citrix, without Citrix, so he is just documenting  
11 his test results.

12 Q. I just want to slow this down just briefly, so that  
13 everyone in the room can understand, because my head  
14 swims sometimes.

15:57:35 15 A. Sorry.

16 Q. The first column, Column A, do you see that?

17 A. I do.

18 Q. Am I correct that these are actions that an Hodell  
19 employee might take on the computer system?

15:57:48 20 A. That is correct.

21 Q. And that these were actually actions that Hodell's  
22 employees did take when Mr. Barnea ran his tests?

23 A. That's correct.

24 Q. Columns F and G, you mentioned those. Do you see  
15:58:02 25 them?

1 A. Yes.

2 Q. Let's start with Column F.

3 A. I'm there.

4 Q. The numbers in this column, those are measured in  
15:58:09 5 seconds?

6 A. That is correct.

7 Q. And they correspond to the item or the action that  
8 the Hodell employee would take in Column A. Correct?

9 A. That is correct.

15:58:20 10 Q. So just, for example, where Line 3 -- let's go  
11 actually to -- Line 3 is fine. It is the first one.

12 Tab out of a line, 296 lines. That is what  
13 the employee at Hodell was actually doing when Mr. Barnea  
14 got these results.

15:58:36 15 A. Well, Mr. Kelleher, let me be clear.

16 I don't know for sure at this point if he  
17 is doing this transaction himself. It is possible that  
18 Mr. Barnea was executing this transaction, but he may  
19 also have been observing someone do it. Either way it  
15:58:53 20 was on the Hodell system.

21 Q. What matters is the action was taken on the system?

22 A. That's correct.

23 Q. And it's representative of an action that a Hodell  
24 user would take?

15:59:00 25 A. That's correct.

1 MR. CARNEY: Objection, Your Honor.

2 THE COURT: Overruled.

3 BY MR. KELLEHER:

4 Q. Sir, Column F, if you could look at that.

15:59:06 5 A. I'm there.

6 Q. These are response times in seconds?

7 A. I'm there.

8 Q. Is this with or without the In-Flight add-on  
9 running?

15:59:14 10 A. These times in Column F are with the In-Flight  
11 ad-on running.

12 Q. And in Column G, we are looking at the same  
13 actions, but without the In-Flight add-on running?

14 A. That is correct, sir.

15:59:27 15 Q. Sir, could you just, in laymen's terms, tell the  
16 jury what the significance is, if any, of the comparison  
17 between with In-Flight and without In-Flight?

18 A. In a few cases, there is very, very little  
19 difference. In a whole bunch of other cases, it is a lot  
15:59:45 20 slower with In-Flight turned on.

21 Q. So, for example, sir, can I direct you to Line 7?

22 A. I'm there.

23 Q. What was the action that is being analyzed there?

24 A. Updating a sales order with 296 lines.

15:59:59 25 Q. How long did it take with In-Flight running?

1 A. 766 seconds.

2 Q. How long did it take without In-Flight running?

3 A. 100 seconds.

4 Q. Sir, can I direct you to line 14?

16:00:16 5 A. I'm there.

6 Q. What action are you looking at there?

7 A. Adding a delivery with a hundred lines.

8 Q. How long did that take with In-Flight running?

9 A. 900 minutes. I'm sorry. Seconds. 900 seconds.

16:00:28 10 Q. Very good. How long did that take without

11 In-Flight running?

12 A. 28 seconds.

13 Q. Can you flip back to the e-mail, sir, on page

14 number one?

16:00:44 15 A. Yes, sir, I'm there.

16 Q. To orient us, this is the summary of Mr. Barnea's

17 visit to Hodell?

18 A. Yes, sir, it is.

19 Q. The paragraph that starts "I can also say that HN

16:00:54 20 network," do you see that?

21 A. I do.

22 Q. Can you read that to the jury?

23 A. I can also say that the Hodell-Natco network has an

24 effect on the overall performances. Out of their 7

16:01:07 25 Citrix servers, four are slower. An example would be



1 changing drawers on the pick list on one server, 152,  
2 that's the server number. It took 54 seconds. While the  
3 same task over a different server, which is the server ID  
4 was 158, took 13 seconds.

16:01:27 5 Q. So there was some technical talk, sir. What is  
6 Mr. Barnea saying to you here?

7 A. At a high level, the hardware was also a  
8 significant contributor to the performance because, one,  
9 when they ran the system or ran the test through one  
16:01:44 10 server, they got one time and when they ran the same  
11 exact transaction through another Citrix server, it was  
12 much slower.

13 Q. Sir, Citrix server, again, at a very high level,  
14 what is that?

16:01:56 15 A. It is a way for a user to connect to the software.  
16 I can say it very simply or I can get a little deeper if  
17 you wish.

18 Q. Actually, I want you to go even higher. So are we  
19 talking about computer hardware?

16:02:10 20 A. That's what we're talking about, yes, sir.

21 Q. Thank you. Sir, a few moments ago we spoke about  
22 patch level 25. Do you remember speaking about that with  
23 me?

24 A. Yes, sir I do.

16:02:24 25 Q. Was that the last patch SAP provided to Hodell?

1 A. No, sir, it was not.

2 Q. I would like to show you what we marked as Exhibit  
3 307.

4 A. I'm there.

16:02:34 5 Q. And I apologize in advance. The words are just  
6 really small.

7 A. I have my glasses.

8 Q. Do you recognize this document, sir?

9 A. Yes, sir, I do.

16:02:43 10 Q. Can you please tell the jury what it is?

11 A. So this is an e-mail to me, and a bunch of people  
12 at SAP, and -- let me see. And some other people are  
13 copied, from Mr. Joe Guagenti, dated September 14, 2007.

14 Q. Sir, who, if you know was Joe Guagenti?

16:03:06 15 A. He was an employee of LSi, I believe.

16 Q. Do you know what Joe Guagenti did at LSi?

17 A. He was a technical person. I believe he wrote code  
18 and did other technical things.

19 Q. And when you say wrote code, do you have any  
16:03:19 20 understanding of which application, if any, he wrote the  
21 code for?

22 A. Yes. I believe he worked on the In-Flight add-on,  
23 yes.

24 Q. Sir, I would like to direct your attention to about  
16:03:29 25 two-thirds of the way down the first paragraph.

1 A. I'm there.

2 Q. It says "we then installed." Do you see that, sir?

3 A. Hang on just a second. Yes, I'm there.

4 No, hang on. I just saw something else.

16:03:45 5 Q. Let me know when you are there.

6 A. I'll find it.

7 Q. Check out the screen --

8 A. I have it now. Okay. Sorry about that.

9 Q. Sir, it says, quote, "we then installed PL-29."

16:04:04 10 Sir, is PL-29, what is that?

11 A. Patch level 29. It is a newer version, newer patch  
12 after 25.

13 Q. That's a software patch provided by SAP to Hodell?

14 A. I'm sorry. Yes.

16:04:16 15 Q. We then installed patch level 29 over the existing  
16 patch level 25 and seen a 500 percent plus in performance  
17 in the sales order. Hodell also seen this performance  
18 increase in their operations. This performance increase  
19 was a direct result of the new set of DLLs provided in  
16:04:42 20 patch level 29.

21 Do you see that, sir?

22 A. Yes, sir, I do.

23 Q. What, understanding did you have when you read this  
24 passage? At the time?

16:04:55 25 A. Patch level 25 was good. It provided a significant

1 improvement in what they were seeing.

2 Q. And how about patch level 29, sir?

3 A. I'm sorry. I meant to say 29. Patch level 29 was  
4 a very good improvement over 25, and we had already seen  
16:05:14 5 some improvements in 25.

6 Q. Sir, did you yourself ever go out to Hodell to see  
7 what was going on there?

8 A. Yes, sir, I did.

9 Q. Do you have a recollection of when that was?

16:05:33 10 A. That would have been in October of that year.

11 Q. Did you go by yourself, sir?

12 A. No, sir, I did not.

13 Q. Who went with you?

14 A. I took Eddie Neveux, one of our solution  
16:05:44 15 architects. We talked about him earlier.

16 Q. What was the purpose of your visit, sir?

17 A. The purpose of our visit was to -- well, I wanted  
18 to meet the Reidl's in person, to begin with. In my role  
19 in customer relations, I wanted to visit with them in  
16:06:02 20 person. We had spoken on the phone but I wanted to visit  
21 with them and let them know we were doing everything we  
22 could. But I also wanted to bring Eddie Neveux because  
23 we were seeing progress but I wanted Eddie, a technical  
24 guy who knows a lot about hardware, he knows a lot about  
16:06:19 25 software and development, and I wanted him to be

1 physically present and see for himself what was going on  
2 and see where we could find some additional improvement.  
3 Kind of do another assessment like Mr. Barnea did and see  
4 what we could do to help.

16:06:32 5 Q. And Eddie Neveux, was he on your team of people  
6 that were helping you at Hodell?

7 A. Yes, sir, he was.

8 Q. Sir, I would like to show you Exhibit 809.

9 A. I'm there.

16:06:44 10 Q. Do you recognize this document?

11 A. I do.

12 Q. Can you tell the jury what it is?

13 A. Excuse me. This is an e-mail from -- well, at the  
14 top or do you want me to --

16:06:57 15 Q. That's a great question. Let me tell you exactly  
16 where I want you to look.

17 A. Okay. Sorry.

18 Q. Can you look at the second page?

19 A. Second page?

16:07:04 20 Q. There is an e-mail that looks like it runs a couple  
21 pages.

22 A. So this is an e-mail from Eddie Neveux, it is dated  
23 October 17, 2007, he is sending it to me, but he is  
24 copying several people inside of SAP. And the subject is  
16:07:20 25 Hodell-Natco visit. This is a summary of his findings

1 and his assessment from going on site to Hodell.

2 Q. And, sir, did you request Mr. Neveux prepare this  
3 summary for you in the ordinary course of your duties for  
4 SAP on the Hodell project?

16:07:35 5 A. Absolutely. Yes.

6 Q. Sir, I would like to direct your attention to the  
7 last paragraph there.

8 A. I'm there.

9 Q. It is a pretty long paragraph, so I'm not going to  
16:07:48 10 ask you to read it into the record. But could you let  
11 the jury know what you understood when you read that?

12 A. Let me briefly reread it just to make sure I get a  
13 good sense.

14 Q. Sure, sir.

16:08:02 15 A. Essentially, he is saying he was there to observe.  
16 One of the things he did was not only take visual  
17 observations but also he used some tools to assess the  
18 performance.

19 Q. And what, if anything, was your understanding of  
16:08:40 20 what results he got from those tools?

21 A. He states here "also to note, the worst performance  
22 that I saw with respect to the logs generated by the  
23 Business One .net profiler tool when doing order entry at  
24 Hodell-Natco was a nine-second delay with respect to a  
16:08:54 25 function entering the sales order using SAP Business One

1 and In-Flight."

2 Q. Sir, what was your understanding when you read  
3 that?

16:09:05

4 A. Well, my understanding was the worst thing he saw  
5 was nine seconds.

6 Q. Sir, you have been working with business software  
7 for how long?

8 A. 22 years.

9 Q. And Business One for how long?

16:09:14

10 A. That would be now 12 years.

11 Q. So in the context of your 22 years experience with  
12 business software, is a nine second delay, can you tell  
13 the jury whether that is good or bad or neither?

16:09:32

14 A. So if that's the worst delay you see, in other  
15 words, you are seeing a whole list of delays, you are  
16 seeing a one-second delay -- you know, when you click  
17 okay or click enter, there is always going to be a delay.  
18 It is a latency. You have to wait for the second to get  
19 pushed and the screen will repaint. Half a second, two  
20 seconds, no big deal.

16:09:49

21 If the worst thing he is seeing in the list  
22 of delays is nine seconds, that seems very reasonable to  
23 me.

16:10:00

24 Q. And, sir, so we're clear about this, because I -- I  
25 don't know that everyone uses business software. When we

1 say an action took a couple seconds, we're not talking  
2 about striking a key and seeing a character appear on the  
3 screen, are we?

4 A. No. We're typically -- what we are typically  
16:10:14 5 seeing is when you hit the "okay" button or the "accept"  
6 button and there is a delay, typically.

7 Q. So when you enter information into the system and  
8 you push enter or submit, right?

9 A. Correct, yes.

16:10:28 10 Q. Sir, I would like you to take a look at the second  
11 page.

12 A. I'm there.

13 Q. Again, I don't want to read all of this, but did  
14 you have any understanding when you read this -- these  
16:10:43 15 words on this page of whether Mr. Neveux had any  
16 conclusions about the In-Flight application?

17 A. He came to the conclusion, if you look at the top  
18 bullet, it summarizes it. He assessed that there was  
19 still an excessive amount of talk or communication  
16:11:01 20 between the In-Flight add-on and SAP Business One and to  
21 note the communication is specifically with respect to  
22 marketing documents -- meaning like sales orders and  
23 sales quotes -- but other areas that were mentioned were  
24 purchase orders as well.

16:11:15 25 Q. At the bottom of the paragraph you read from, it



1 says, quote, others on my team. Do you see that?

2 A. The paragraph I just read? I do further down.

3 Yes.

4 Q. Do you see it?

16:11:36 5 A. I do.

6 Q. It says others on my team as well as myself have  
7 looked at the logs generated by the In-Flight add-on.

8 Let me stop there. Do you have an understanding, sir, of  
9 what he means by looked at the logs generated by the

16:11:49 10 In-Flight add-on?

11 A. I'm not a developer. So this would be very high  
12 level, but what he is talking about is when -- you can  
13 install software that will generate a log or a document.  
14 It is just a document that you can read, it is text, and  
16:12:05 15 it will give you information about the transactions that  
16 are going on.

17 Q. Thank you, sir. It continues, "and believe that  
18 there simply may be a need for LSi to" quote, rearchitect  
19 their code.

16:12:19 20 Did you have an understanding of what he  
21 meant when he said that to you?

22 A. Again, I want you to talk to Mr. Neveux  
23 specifically. He is saying the programming in the  
24 In-Flight add-on needed to be worked on, needed to be  
16:12:35 25 improved. That's what he was saying.

1 Q. Sir, I would like you to look at Exhibit 262.

2 A. I'm there.

3 Q. And I'm going to direct your attention to the  
4 second e-mail -- excuse me, the e-mail on the second  
16:12:52 5 page.

6 A. I'm there.

7 Q. Do you recognize this document, sir?

8 A. I do.

9 Q. Can you tell the jury what it is?

16:13:00 10 A. So this is an e-mail from me to Michael Sotnick,  
11 who at the time was the manager for Mr. Dan Kraus. He  
12 also copies Suzanne Fuerst and a gentleman by the name of  
13 Dipin Shah.

14 Q. Sir, under the summary tab, the second sentence is  
16:13:18 15 Eddie Neveux has made recommendations, some implemented  
16 by LSi, some not. Do you see that?

17 A. Yes, sir, I do.

18 Q. Do you have any understanding of what you meant  
19 when you read it?

16:13:28 20 A. Yes. It means that he had given IBIS/LSi a list of  
21 recommendations that he suggested they should do to their  
22 In-Flight add-on and he is reporting here that they had  
23 done some but not all of his recommendations.

24 Q. Sir, at the bottom of the page, underlined, it says  
16:13:44 25 "evaluation of In-Flight code by Eddie Neveux." Do you

1 see that?

2 A. Yes, I do.

3 Q. Flip to the second page. The bullets continue.

4 I want you to look at the bullet that

16:13:58 5 starts "while the code itself." Do you see that?

6 A. I do.

7 Q. Do you have any understanding of what -- what was  
8 your understanding when you read this?

9 A. Again, I'm going to say I'm not a developer, so

16:14:12 10 I -- I can't speak with developer terms. However --

11 Q. Only if you know, sir.

12 A. Okay. What I do know is what he is saying here is  
13 that the language that was used was fine language, but it  
14 was constructed poorly. It had a bad foundation. And  
16:14:28 15 there was a problem with the way the In-Flight add-on had  
16 been -- it is like if you build something on a bad  
17 foundation to begin with, no matter what you put on top  
18 of it is not going to be stable and that's what I think  
19 he was trying to communicate.

16:14:40 20 Q. Sir, the next underlying topic says "evaluation of  
21 IFV" that is In-Flight. Evaluation of In-Flight code by  
22 Apollo Consulting. Do you know anything about that?

23 A. Yes, sir, I do.

24 Q. Can you tell the jury about that?

16:15:01 25 A. So one of the -- like I said, I want to say this

1 again. We tried everything we could. We wanted to help  
2 in this situation. We looked at our own software. We  
3 looked at their hardware. We wanted to look at their  
4 software. We wanted to evaluate the In-Flight add-on.  
16:15:18 5 We offered to do this.

6 We had great difficulty obtaining the  
7 In-Flight software from IBIS/LSi. I can't say why, but  
8 we asked numerous times for them to give us the code.  
9 We'll look at it for you. We'll examine it. We'll see  
16:15:35 10 if there are some suggestions that we can make that might  
11 help you.

12 We never got the whole package, so we said  
13 look, if you are really concerned about SAP having your  
14 product, then how about we hire a third-party company  
16:15:49 15 that does this? They have successful add-ons. They are  
16 what we would call experts. So why don't we hire them.  
17 We offered to pay. We suggested we would pay for their  
18 assessment of the software, and that company was Apollo.  
19 Apollo Consulting.

16:16:05 20 Q. Thank you, sir. Did IBIS/LSi ever give you all of  
21 the In-Flight code?

22 A. Only a small piece of it. Apollo never got the  
23 entire program.

24 Q. Sir, how long did you work on the Hodell project?

16:16:18 25 A. Well over a year.

1 Q. And when -- just around, if you remember, did you  
2 stop?

3 A. I believe it was early -- wait. Let me think  
4 about this. It was probably about the same time in 2008.  
16:16:34 5 March, 2008. I don't remember specifically. I'm sorry.

6 Q. So do you mean 2009?

7 A. Yes. March, 2009. Yes. I'm sorry. I'm getting  
8 my dates wrong.

9 Q. Sir, can you take a look at Exhibit 109?

16:16:57 10 A. Yes, sir. I'm there.

11 Q. Do you recognize this document?

12 A. Yes, sir, I do.

13 Q. Can you tell the jury what it is?

14 A. This is an e-mail from, again, Michael Sotnick, who  
16:17:18 15 was vice president over Dan Kraus at the time, to Kevin  
16 and Otto Reidl, and he is including Dan Kraus as well as  
17 Jon Woodrum from LSi. It is dated November 16, 2007.

18 Q. Sir, I would like to direct your attention to the  
19 penultimate paragraph there. It starts with "finally as  
16:17:42 20 we talked."

21 A. I see that.

22 Q. What was your understanding of what was being  
23 written here?

24 A. So what Mr. Sotnick is saying is that he had had  
16:17:53 25 conversations with Hodell-Natco and what he is saying

1 here is that one of the options that they can consider is  
2 to look at other SAP solutions. Business One is, you  
3 know, generally our lowest end business management  
4 software. It is a great product. It does really, really  
16:18:17 5 well, but we also have some other products in our  
6 portfolio that are designed for even larger companies and  
7 what he is suggesting here is that if they want to  
8 continue to -- I mean, let me back up.

9 We are still doing everything we can at the  
16:18:33 10 time to make sure that Business One can work, and quite  
11 frankly, I still believed that it could. I felt like  
12 Business One was still going to be the right solution for  
13 these guys and it would work.

14 But Mr. Sotnick is telling them guys, if  
16:18:45 15 this is not the direction you want to go, we have other  
16 options. We are more than willing to let you consider  
17 our other options and SAP was saying we'll even give  
18 significant financial consideration if that's the  
19 direction you want to go.

16:19:00 20 Q. Sir, did you or, to your knowledge, anyone else at  
21 SAP ever tell Hodell to abandon Business One?

22 A. No, never.

23 Q. Sir, we talked a lot today about performance  
24 issues. Did the performance issues at Hodell ever  
16:19:18 25 resolve?

1 A. Well, what we saw and this is consistent from the  
2 time Mr. Barnea went and the time Mr. Neveux went. What  
3 we observed is that the performance was not that bad.  
4 However we were being told by the customer that it was  
16:19:38 5 still not acceptable, still too slow, still looking for  
6 improvement. So we continued our effort. Generally  
7 speaking, what we were observing is not as bad as what we  
8 were being told.

9 Q. Sir, do you have an understanding of whether Hodell  
16:19:53 10 could have continued on Business One and had success?

11 MR. CARNEY: Objection.

12 THE COURT: Overruled.

13 A. It is my belief we could have absolutely continued  
14 on this and been successful, yes.

16:20:04 15 Q. Sir, did SAP, to your knowledge, ever come to an  
16 official conclusion as to the cause of the performance  
17 problems?

18 A. Officially, no. No, sir, we never did.

19 Q. And do you have an understanding of why no official  
16:20:14 20 conclusion was drawn?

21 A. I would suggest primarily speaking because we never  
22 got our hands on the In-Flight add-on to assess it  
23 properly. And so we couldn't come to the conclusion. We  
24 found some areas where we could improve some things, we  
16:20:28 25 could make our, you know -- so forgive me, can I explain

1 something to the jury, just briefly?

2 Q. Yes.

3 A. Okay. There is the Business One core product, all  
4 right? It is just a standard business operating

16:20:47 5 software. Then you have the In-Flight add-on over here.

6 And between the two there is this pipe, called a DI-API.

7 You probably termed that term. All it is is a pipe. It

8 is a piece of software that lets the core Business One

9 talk to the other Business One. Now, again, I'm not

16:21:06 10 technical. So I'm doing it in very plain terms.

11 That pipe worked for a lot of people.

12 There were a lot of add-ons, that the pipe was fine for a

13 lot of people. The core Business One product worked.

14 What was happening, we read this, but what

16:21:21 15 was happening was that the In-Flight add-on, while, you

16 know, it may be functionally good, it was just trying to

17 shove too much stuff down the pipe, and it was causing

18 performance problems. So what did we do? We said what

19 can we do to improve the pipe, let's see if we can make

16:21:40 20 it a bigger, stronger, better pipe and that's what we

21 did.

22 Q. Sir, is it your understanding that there is a way

23 to develop In-Flight that doesn't push so much

24 information through the pipe?

16:21:50 25 A. Based on the experts -- not my assessment but



1 based on the expert's assessment --

2 MR. CARNEY: Objection, Your Honor.

3 THE COURT: Objection sustained.

4 BY MR. KELLEHER:

16:22:03 5 Q. Sir, in this case, Hodell is saying that SAP --  
6 and forgive me. They are saying that SAP tried to  
7 conceal information from Hodell.

8 Do you have any response to that?

9 A. That is absolutely false. We did not try to  
16:22:21 10 conceal anything from them.

11 Q. And, sir, specifically, why do you say that?

12 A. We did everything we could for this customer.  
13 There were a lot of people that were very involved in  
14 this. We answered every e-mail, took every phone call.

16:22:37 15 We responded. We put people on site. We weren't  
16 concealing anything. Were we working feverishly behind  
17 the scenes, sure. But concealing stuff? No. Absolutely  
18 not.

19 Q. Sir, did you have a motive to trick Hodell with  
16:22:53 20 Business One?

21 A. No, sir.

22 MR. CARNEY: Object. Objection, Your  
23 Honor.

24 THE COURT: Overruled.

16:22:58 25 A. No. We had zero motive to trick Hodell or any

1 other customer for that matter.

2 Q. Why do you say that, sir?

3 A. We wanted to be successful. If you trick a  
4 customer, they are never going to be successful with the  
16:23:12 5 product. If you tell them something and it doesn't work  
6 and you trick them, the program, the software is not  
7 going to work.

8 We want the customer to be successful. We  
9 have a database of success stories. We use those success  
16:23:24 10 stories to sell more software.

11 If you go around tricking customers and  
12 misleading them, you are not going to have a database of  
13 successful customers and you are not going to be able to  
14 market.

16:23:35 15 Q. Sir, does SAP sell larger software products than  
16 Business One?

17 A. We do. And if we were tricking one, why wouldn't  
18 we trick them to go with one of the more expensive  
19 products?

16:23:47 20 Q. Sir, we talked a lot this afternoon about the  
21 efforts that you and your team put into the project at  
22 Hodell after go-live to address the issues that they were  
23 reporting. Can you give the jury a sense of how many  
24 hours you worked?

16:24:10 25 A. Forgive my French, but we worked our asses off. We

1 really did. A lot of people did. I just said we wanted  
2 this customer successful, and I myself alone, if you were  
3 to tally up all of the hours in the course of this time,  
4 from the moment I found out about it, it is in the  
16:24:30 5 hundreds if not approaching thousands of hours over the  
6 course of time. This was a time-consuming thing for me.  
7 Stayed up late nights creating reports. Talking to  
8 people overseas in different time zones. And we have  
9 dozens of people at SAP that are all -- they all have  
16:24:49 10 their hands on this trying to find a remedy.

11 Q. Sir, the effort that you just described, your  
12 effort and the members of your team, did SAP charge  
13 Hodell for any of that?

14 A. No, sir. This was not -- this was not anything we  
16:25:04 15 would bill for, no.

16 Q. Sir, do you know, and only if you know, how much  
17 money SAP made from this sale?

18 A. I can round it to less than \$150,000.

19 Q. Sir, if you know, did SAP spend more money than  
16:25:20 20 that trying to help Hodell?

21 A. I can't say that quantitatively sir. I can say  
22 that based on my time and my salary alone, absolutely, we  
23 spent a whole lot more than that.

24 MR. KELLEHER: Your Honor, I do have  
16:25:35 25 further questions but this is a natural breaking point.

1 I don't know if you would like me to proceed.

2 THE COURT: I don't know. Let's ask the  
3 people who care.

4 Okay. Now, tomorrow, you are allowed to  
16:25:47 5 bring your coffee in. I got it approved by the girls.  
6 They yelled at me a little bit for interfering in their  
7 responsibility, but nonetheless, if you want to bring  
8 coffee in in the morning, you can. Okay?

9 So, thank you for your patience today and  
16:26:04 10 your attention.

11 Same time, same station. What floor?

12 THE JUROR: We'll be on L1.

13 THE COURT: Okay. 8:15. See you then.

14 (Proceedings adjourned at 4:26 p.m.)

15 - - - -

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19 C E R T I F I C A T E

20 I, Judith A. Gage, Federal Official Court Reporter,  
21 certify that the foregoing is a correct transcript from  
the record of proceedings in the above entitled matter.

22 Judith Gage June 17, 2015

23 Judith A. Gage Date

24

25